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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

COLLINS *v.* ASSOCIATED GREYHOUND RACECOURSES, LIMITED.

[1928. C. 621.]

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LUXMOORE J.
March 7, 8, 11, 18.
C. A.
May 31; *June* 4, 5.

Company—Prospectus before Incorporation—Sub-underwriters—Adoption of Prospectus by Company—Misrepresentation—Principal and Agent—Undisclosed Principal—Allotment Letter—Renunciation in Favour of Principal—Claim for Rectification of Share Register by Principal.

Shortly before the incorporation of a company, a draft prospectus, which was afterwards adopted by the company, was circulated for the purpose of obtaining underwriters of shares intended to be offered to the public by the proposed company. An investment company entered into an underwriting agreement on November 28, 1927, by which they agreed that they would within three days of the issue of the prospectus "either subscribe themselves . . . . on the basis of the said prospectus for 1,164,000 . . . . shares of 5*s.* each or cause the same before the date aforesaid to be subscribed on the terms of the said prospectus by responsible persons," and any reasonable objection might be taken by the company within two days to persons put forward by the investment company. On November 29, 1927, M. and O. signed and remitted an offer to underwrite 12,000 shares addressed to the investment company and also an application for the shares addressed to the proposed company, which was accompanied by a cheque for 600*l.* On December 12, 1927, the incorporation of the proposed company took place, and the underwriting agreement and prospectus were adopted by the company and the prospectus issued to the public. The public response was insufficient, and 8160 shares were allotted to M. and O., the allotment letter bearing at the back a form of renunciation. M. and O. were agents for the plaintiff, who had provided the 600*l.* They renounced the shares in favour of the plaintiff, who paid the further sum of 624*l.* due on allotment and sent the allotment letter to the company, who replied stating that it had been duly registered in his name and placed his name on the register of shareholders.

The plaintiff, as Luxmoore J. found on the evidence, had applied for the shares on the faith of the draft prospectus which contained, as he also found, an innocent misrepresentation. On learning of the misrepresentation, the plaintiff had brought this action for rectification of the company's register by the removal of his name and for repayment of the sum of 1224*l.* :—

Held, by the Court of Appeal (affirming the decision of Luxmoore J.), that the plaintiff was not entitled to rescission, because (1.) the contract between M. and O. and the company was of such a class that M. and O. must be treated as the principals, so that the plaintiff, as the undisclosed principal, could not sue on the contract or obtain its rescission, and (2.) the contract constituted by the company's acceptance of the plaintiff's authority under the renunciation to place his name on the register could not be treated as a contract entered into on the basis of the draft prospectus.

Per Luxmoore J. The fourth head stated in *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178, 183 as one of those within which a person must bring himself to obtain rescission of a contract to take shares on the ground of misrepresentation should be corrected so as to read : "Where the contract is made to the knowledge of the company on the basis of certain representations and it turns out that some of them were material and untrue."

ACTION.

In this case the plaintiff sought to have his name removed from the register of members of the defendant company as the holder of 8160 shares of 5*s.* each.

The ground of the application was that the defendant company had committed a breach of contract with the plaintiff by failing to purchase two greyhound racing tracks in Ireland. These tracks had been specially mentioned in a prospectus issued by the company on the faith of which the plaintiff (certain rights of subscription having been renounced in his favour) had, as he alleged, sub-underwritten a considerable number of shares in the defendant company.

The plaintiff further claimed repayment by the defendant company to the plaintiff of a sum of 1224*l.* (being the total amount paid by him) with interest thereon at 5 per cent.

The following statement of the facts is substantially taken from the judgment of Luxmoore J. :—

The plaintiff, Mr. Manley Collins, carries on business as a financier, and in the course of his business he is in the habit of underwriting shares in companies which are to be offered for public subscription. At the invitation or at the introduction of a Mr. H. C. Mason, who was a director of a company called the Equitable Securities Company, Ld., the plaintiff was at the end of November, 1927, minded to underwrite some of the shares in the defendant company to be offered to the public for subscription. The defendant company was not at this time incorporated, but there were proposals on foot for its incorporation. The company was to be incorporated for the purpose of acquiring as going concerns and of carrying on greyhound racecourses at eight specified places, six of them in England, and two of them in Ireland; the two in Ireland being at Dublin and Belfast respectively. The capital of the company was to be 450,000*l.* divided into 1,800,000 shares of 5*s.* each. The promoters had caused contracts to be entered into between the proprietors of the racecourses in all the eight specified places, and had nominated trustees for and on behalf of the proposed company for the purchase of the racecourses as going concerns, for sums amounting in all to the total sum of 312,000*l.*, of which 104,000*l.* was, at the option of the proposed company, to be satisfied by the allotment of fully paid shares in the company to the like nominal value.

In order to provide the necessary finance to enable the racecourses to be acquired, it was proposed that the bulk of the shares should be offered to the public. 1,600,000 shares were to be offered, but as part of the purchase price was payable at the company's option in shares, it was only necessary to obtain underwriting in respect of 1,164,000 of the 1,600,000 shares. To this end an agreement for underwriting was entered into between two gentlemen as trustees for and on behalf of the proposed company, and a company called the Broad Street Investments, Ld. It is dated November 28, 1927, and it contains recitals, first, of the

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intended incorporation of the proposed company and its capital, and as to the proposal to offer 1,600,000 shares for public subscription, and the recital goes on to state that "such offer is to be made on the terms of the draft prospectus annexed hereto, subject to such modification as may be necessary (whether or not incorporating a change of the name of the company) prior to the filing thereof with the registrar of joint stock companies." No draft prospectus was in fact attached to the original agreement, but the parties agreed that the draft prospectus referred to was the document exhibited in the action, and dated November 28, 1927. The agreement provides that "The underwriters"—i.e., the Broad Street Investments, Ld.—"will within three days after issue of the said prospectus either subscribe themselves on the terms hereinafter stated and on the basis of the said prospectus for 1,164,000 of the said 1,600,000 shares of 5*s.* each, or cause the same before the date aforesaid to be subscribed on the terms of the said prospectus by responsible persons and/or companies who shall pay the application money payable on the said shares applied for by them respectively and shall not withdraw their applications before allotment provided that the underwriters shall not be responsible for any sub-underwriters whose names have been accepted by the company." Then the agreement states the dates when the various instalments for the shares shall be paid, and clause 2 provides that "The company shall be deemed to have accepted as complying with the provisions of the last preceding clause any proposed subscriber whose name and address and the requisite application for the shares subscribed together with the deposit payable thereon are furnished by the underwriters to the secretary of the company and to which subscriber the company shall not take reasonable objection in writing within two days after receipt by the company of the aforesaid particulars." Then clause 3 provides for the consideration to be payable for the underwriting, and clause 4 says: "The allotment by the company of the said 1,164,000 shares or any part thereof to applicants therefor shall relieve the underwriters to the extent of the shares so allotted of all further responsibility in respect thereof except so far as the allotment of shares is made to them." Clause 5: "Upon the adoption of this agreement by the company in such manner as to render it binding upon the company the trustees shall be discharged from all liabilities in respect thereof."

Now the draft prospectus referred to in the agreement was obviously prepared for the purposes of the underwriting contract, and as the substantial basis on which it was entered into. On November 29, 1927, Mr. H. C. Mason and a Captain Spencer Ovington signed an offer to sub-underwrite 12,000 of the shares in the proposed company. This offer for the 12,000 shares was addressed to the underwriters, Broad Street Investments, Ld., and was sent together with an application form addressed to the proposed company, and a cheque for 600*l.*, to a firm called Dobree & Sons, who in their turn handed the offer, the application form, and the cheque, to the Broad Street Investments, Ld. This offer was in fact made by Mr. H. C. Mason and Captain Spencer Ovington, who were both directors of the Equitable Securities Company, Ld., for and on behalf of the plaintiff, the plaintiff having authorized the offer, and the application being as a matter of fact made on his behalf as the result of a conversation that he had with Mr. H. C. Mason over the telephone on the same day. On the following day, November 30, 1927, the plaintiff himself signed a similar offer and form of application in respect of the 12,000 shares. This offer and application form was sent by the plaintiff to the Equitable Securities Company, Ld., together with his cheque for 600*l.*, but they were not used, the documents in fact used being the form of application and offer signed by Mr. H. C. Mason and Captain Spencer Ovington, which I have already mentioned. On December 8, 1927, Broad Street Investments, Ld., accepted Mr. H. C. Mason and Captain Spencer Ovington's offer to underwrite the 12,000 shares.

On December 12, 1927, the proposed company was incorporated, and on the same day various agreements were executed by the company adopting the agreements for the purchase of the racecourses, and also adopting the underwriting agreement of November 28, 1927. A prospectus substantially in the same form as the draft prospectus referred to in the underwriting agreement of November 28, 1927, was signed by the directors.

On December 15, 1927, this prospectus was issued to the public, and the subscription lists for 1,600,000 shares offered under it were open. The public response was not as large as was hoped, but on December 17, 1927, the directors decided to allot the shares. 388,022 shares were allotted in response to applications by members of the public, and 775,978 being the balance of the 1,164,000 shares underwritten, were allotted to the underwriters or sub-underwriters put forward by Broad Street Investments, Ld. The allotments to the underwriters included one of 8160 shares to Mr. H. C. Mason and Captain Spencer Ovington, the 8160 shares being the proper proportion of the 775,978 shares, not subscribed for by the public, referable to the 12,000 shares applied for by Mr. Mason and Captain Spencer Ovington. The company by this allotment accepted Mr. H. C. Mason and Captain Spencer Ovington as sub-underwriters, and to this extent released the Broad Street Investments, Ld.

The allotments having been resolved upon, the defendant company sent out allotment letters to the respective allottees. These allotment letters were in the same form, except that those which were sent to the underwriters or sub-underwriters had printed on the top right hand corner, the letters "U. W."—meaning "Underwriting"—with a space for the insertion of the appropriate code numbers. Each allotment letter had on its back a form of renunciation. It states "Allotment of 8160 shares," and calls for payment of the amount, 624*l.*, which was now payable on allotment. On the back of it there is a form of renunciation to be signed by shareholders only whose rights are renounced. The letter is in this form: "When the balance (if any) due on allotment has been paid by you, this letter of allotment can be renounced until January 21, 1928, in favour of any other person, provided the form of renunciation below is duly completed and signed, and that the person in whose favour the renunciation is made signs the form of acceptance, also below." Then it goes on to state: "Renounced allotment letters must be forwarded to the transfer office of the company as shown on the reverse side of this letter, on or before January 21, 1928. Thereafter it will only be possible to transfer such shares by deed in the ordinary way." Then there is a form for renunciation, which is in this form: "To the Directors of Associated Greyhound Racecourse, Ld. Gentlemen, I we hereby renounce my/our rights to the within-named shares, and nominate"—then that form is filled in with the name of the plaintiff, Mr. Collins—"to have all the benefits thereof," and then it says: "Signature of Holder," and it is signed by Mr. Mason and Captain Ovington. Then there is a form of acceptance to be signed by the nominee: "I/we hereby accept the nomination to the rights to the within-named shares, and I/we authorise you to place my/our name(s) on the register of members in respect of the said shares." Then follows the name and address of the plaintiff, and that is signed by him with his signature.

Now Mr. Mason received the allotment letter in respect of the application made by him and Captain Ovington on December 18, 1927. On December 20, 1927, he forwarded it to the plaintiff together with the renunciation form, filled in in favour of the plaintiff and signed by Captain Ovington and himself. On January 6, 1928, the plaintiff sent his cheque for 624*l.* to the Midland Bank, as required by the allotment letter, the receipt for this sum was acknowledged by the bank on January 7, 1928, and a receipt for it indorsed on the allotment letter. On January 17, 1928, the plaintiff wrote to the defendant company enclosing the allotment letter in respect of the 8160 shares duly renounced in his favour and asking for "allotment letter in my name by return." On January 18, 1928, the defendant company returned the allotment letter in respect of the 8160 shares stating that it had been "duly registered in your name as required." On January 21, 1928, the plaintiff's name was entered on the register of shareholders of the defendant company, and his name was the first name registered in respect of the 8160 shares.

I have dealt with the events which resulted in the allotment of the 8160 shares and the registration of the plaintiff as the holder of those shares, without reference to some important events which transpired between the date of the allotment on December 17, 1927, and the registration of the shares on January 21, 1928, in the plaintiff's name. These events have an important bearing on the case, and I will now state them. Apparently on December 16, 1927, a letter was written to the Broad Street Investments, Ld., on behalf of a group of sub-underwriters to the effect that they repudiated the sub-underwriting contracts entered into by them with the Broad Street Investments, Ld. The directors were not informed of this until December 17, 1927, when they allotted the shares. Two of the directors, Admiral Sir Sydney Freemantle and a Mr. Hill, and the secretary of the company, Mr. Anderson, were called as witnesses, and each of them said he knew nothing of any difficulty with regard to the underwriting at the time of the allotment. They were not cross-examined on this point, and Mr. Topham on behalf of the plaintiff accepted their evidence that at the date of allotment, December 17, 1927, the directors had no knowledge of any difficulty with regard to the underwriting; and sub-underwriters were in fact accepted by the defendant company; and to this extent the Broad Street Investments, Ld., was released from its liability as underwriters.

On December 19, 1927, the cheques given by some of the sub-underwriters were returned to the defendant company by their bankers marked "payment stopped." It is admitted that the sub-underwriting in respect of which cheques were stopped, affected a large number of shares, the total nominal value of such shares being in excess of 97,000*l.*, and it therefore became clear to the directors that it would, to say the least, be very dangerous to proceed with all the contracts for purchase as they stood, and that it was essential to communicate with the respective vendors to see if arrangements could be made for variation of the terms as to payment of the purchase price. The contract for purchase of the Dublin and Belfast racecourses is in evidence before me, and this shows the difficult position in which the directors were placed, because by an agreement dated November 28, 1927, between the National Greyhound Racing Company, Ld., and S. W. Penwill and A. J. Falkner as trustees for the proposed company (which agreement was adopted on December 12, 1927, by the defendant company), it was provided that the purchase price for the Dublin and Belfast racecourses and assets should be paid as to 7600*l.* upon allotment by the defendant company (but not later than December 22, 1927), and 21,650*l.* three days after allotment (but not later than December 25, 1927), and as to the remainder in two instalments, the last being payable before February 29, 1928. By clause 16 of the agreement it was provided (inter alia) that if the payment of 7600*l.* was not duly made, either party might by notice in writing rescind the contract; and further, if from any cause other than the wilful default of the vendors the said payments of 21,650*l.* and the other two instalments or any of them were not made within seven days of the dates fixed for payment, then either party could rescind the agreement, the deposit of the 7600*l.* being forfeited to the vendors.

It was obviously impossible at that time to call a meeting of the subscribers in view of the short time at the disposal of the directors. They endeavoured to obtain time for payment and succeeded in the case of the vendors of the English racecourses, but the Irish vendors were not ready to give any facilities whatever, and on December 23, the defendant company's solicitors received a telegram from the Irish vendors' solicitors: "Absolutely refuse to vary contract"; and on December 24, 1927, the defendant company's solicitors received a letter from the Irish vendors' solicitors which, so far as it is material, says this: "It was impossible to summon a board meeting to deal with your communications, but we consulted as many of the directors as possible, and they consider the failure of the company to pay the preliminary instalment as an unjustifiable breach of faith, and are in favour of rescinding the contract in exercise of the power in that behalf contained in clause 16."

On December 29, 1927, the defendant company's solicitors again wrote to the Irish vendors' solicitors in these terms: "We are instructed by the board of the above company to inform you that a block of sub-underwriters have made default in payment of allotment moneys due on their shares, and that, pending the result of legal proceedings to recover payment from them, the company is not in a position to carry out its full purchase programme. The company does not dispute that power of rescission has arisen, and we hope that this letter makes their position clear to you."

On January 6, 1928, the Irish vendors' solicitors wrote to the defendant company's solicitors a letter in which they acknowledge the receipt of the letter I have just read. They say this: "Our clients entered into this contract on the faith of representations that the issue would be underwritten by responsible and solvent underwriters, and we assumed that your clients' board took steps to satisfy themselves that this was so. They should therefore not be embarrassed by any default on the part of sub-underwriters. We would also assume your clients' board took these matters into consideration before going to allotment"; and then they end up by saying: "We are advising that the proper course is to take legal proceedings without further correspondence." On January 12 the Irish vendors rescinded the contract for sale.

No information was in fact given to the allottees, and it was not until February 3, 1928, that the plaintiff had any idea of what had happened. On that date he received a circular letter dated February 2, 1928, from Broad Street Investments, Ld., which stated in the only material paragraph: "The directors of the company have purchased the six English greyhound tracks but have decided not to proceed with the purchase of the two Irish tracks, and now the spring racing season is approaching the company have every appearance of proving a great success." The plaintiff, on receipt of that circular letter, consulted his solicitors, who on February 9 wrote to the defendant company saying:

"Our client in pursuance of a sub-underwriting agreement signed a form of application for 12,000 shares in the above named company upon the basis of the company's prospectus and paid a deposit of 600*l*. On December 18, our client received an allotment letter allotting him the above-mentioned 8160 shares and he has paid the further sum of 624*l*., being the sum payable by him on allotment, making 1224*l*. in all. Our client has now learned to his complete surprise that the company does not propose to proceed with the purchase of the Dublin and Belfast tracks. If this is so, it means that the company will not acquire two assets from which, according to the company's prospectus, more than one-third of the estimated profits of the company, as appearing in such prospectus, were to be derived. Our client only signed the form of application and agreed to take shares from the company upon the basis and upon the representation and definite statement by the company in its prospectus that it would acquire the Dublin and Belfast tracks. The actual words used are 'The company is acquiring the benefit of the above freeholds and leaseholds.' In the above circumstances any decision by the company not to proceed with the purchase of the Dublin and Belfast tracks will amount to a breach by the company of a material term of the contract between the company and our client under which our client agreed to take shares, giving him a right to treat such contract as at an end," and then they ask for the removal of the plaintiff's name from the register and the return of the 1224*l*. already paid by him.

The company's solicitors replied to that letter on February 13, 1928, in a letter in which they say: "The non-acquisition of the racecourses, at Dublin and Belfast was due to the action of a group of sub-underwriters who attempted to withdraw their underwriting on the second day of the public issue, and to repudiate the shares duly allotted to them. Legal proceedings were at once instituted to compel payment to the company of the amounts due on these shares, and the directors are advised by two eminent counsel that the company has a clear case against these defaulters. The immediate consequence, however, was that the company found itself unable to make the whole of the very large payment due to its vendors upon allotment. The directors succeeded in making arrangements for extended terms of payment in respect of certain of the tracks proposed to be acquired, but the amount of money received at that date did not justify them to complete these arrangements with all the tracks, and in consequence the vendors of the Irish tracks withdrew from the sale. The directors have exercised very great deliberation and care, and they are convinced that their actions have been to the best advantage of the shareholders, ..."—and then they say: "We have advised the directors that neither the statements in the prospectus nor the events which have happened entitle your client to repudiate his shares." Accordingly on February 18, 1928, the writ in this action was issued.

I should add that the defendant company proceeded against the sub-underwriters who had stopped payment of their cheques; it was found that they were unable in the main to carry out their underwriting agreement, and in the result some 5000*l*. only out of the 97,000*l*. which should have resulted from the sub-underwriting contracts in question, has up to the present been recovered.

A. F. Topham K.C. and *H. Wynn Parry* for the plaintiff. The plaintiff is entitled to have his name removed from the register. He underwrote these shares on the faith of a statement in the defendant company's draft prospectus that the Irish tracks would be secured.

There was a misrepresentation, it is submitted, in the prospectus, even though it was issued before the incorporation of the company, and the contract which exists between the plaintiff and the company can be rescinded: see Buckley on the Companies Acts, 10th ed., p. 89, and *In re Metropolitan Coal Consumers' Association*; *Karberg's Case* (1), and the earlier case of *In re Russian* (*Vyksounsky*) *Iron Works Co.*; *Stewart's Case*. (2) The plaintiff was a party to the contract, in the sense that although not actually a direct party, he was in the position of a principal, and Mr. Mason and Captain Ovington were acting as his agents. The misrepresentation therefore of the defendants rendered the contract nugatory: see Lindley L.J. in *Karberg's Case.* (1)

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(1) [1892] 3 Ch. 1.

(2) (1866) L. R. 1 Ch. 574.

Before the allotment was made the facts had altered; and although there were the words "will purchase" in terms future, they will not prevent misrepresentation if a purchaser buys shares on the faith of it: see *Karberg's Case* (1) and *Stewart's Case.* (2)

See also for cases where an applicant was entitled to have his name removed from the register: *In re Scottish Petroleum Co.; Anderson's Case* (3) and *In re Scottish Petroleum Co.* (4), in the judgment of Fry L.J.

Although the plaintiff was not a direct allottee, yet the plaintiff in effect had direct relations with the company: *Peek* v. *Gurney* (5), where the principle is laid down in the judgment of Lord Chelmsford. He is entitled to have his name removed from the register and to repayment of the amount paid by him for the shares.

Gavin Simonds K.C. and *Lionel Cohen K.C.* for the defendants. The plaintiff is not entitled to rectification of the register of members of the defendant company. The transaction between the plaintiff and Spencer and Ovington did amount to a transfer, and his name should not be removed: see *In re Pool Shipping Co.* (6) There can be no action for deceit: see *Peek* v. *Gurney* (7); nor was there, it is submitted, any misrepresentation by the defendant company: see per Lord Cairns in that case. There was no misrepresentation by the defendants to Spencer and Ovington; therefore how could the defendants be in any way liable to the plaintiff?: see *Hyslop* v. *Morel.* (8)

The plaintiff relies on the statements in the draft prospectus; no misrepresentation was contained in it. The contracts referred to in the prospectus were those which the company had entered into to acquire certain rights. The company had not actually contracted to purchase the tracks but only stated they were going to enter into contracts to purchase them. There was no misrepresentation. *Karberg's Case* (1) has never been properly understood, but is very different from this present one, and cannot assist the plaintiff. The whole basis of Lindley L.J.'s judgment there was one of misrepresentation, which does not arise here. Further, the case of *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (2) clearly shows what a plaintiff must show to make a company liable for misrepresentation. *In re Canadian (Direct) Meat Co.; Tamplin's Case* (3) cannot be relied on.

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(1) [1892] 3 Ch. 1, 13.
(2) L. R. 1 Ch. 574.
(3) (1881) 17 Ch. D. 373, 377.
(4) (1883) 23 Ch. D. 413, 438.
(5) (1873) L. R. 6 H. L. 377, 395.
(6) [1920] 1 Ch. 251.
(7) L. R. 6 H. L. 377, 389, 391, 403, 406.
(8) (1891) 7 Times L. R. 263.

A. F. Topham K.C. replied. The case of *Hyslop* v. *Morel* (4) is different from the present one. The company put the principal on the register, not the nominee. It is a question whether the undisclosed principal can sue for, e.g., fraud: *Karberg's Case.* (1) See also *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (2), the fourth head. See also Palmer's Company Precedents, 13th ed., p. 180. On the question of a principal suing see *Spurr* v. *Cass.* (5)

[LUXMOORE J. referred to *Humble* v. *Hunter* (6)—this particular point of an undisclosed principal does not seem to have arisen before.]

Wynn Parry replying. It is submitted that is so.

[LUXMOORE J. The law seems to be correctly stated in Pollock on Contracts, 9th ed., p. 108.]

Wynn Parry referred to *Mayhew* v. *Eames.* (7) Knowledge of the principal is knowledge of the agent. The case of *Hyslop* v. *Morel* (4) can be distinguished by a reference to the Stamp Acts.

LUXMOORE J. This is in effect an action for rescission of a contract to take 8160 shares of 5*s*. each in the capital of the defendant company; and the plaintiff asks for rectification of the defendant company's share register by the removal of his name therefrom as the holder of 8160 shares, and also for the return of the moneys paid by him in respect of those shares amounting to the total sum of 1224*l*.

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(1) [1892] 3 Ch. 1, 13.

(2) [1896] 1 Ch. 178, 182, 183.

(3) [1892] W. N. 94, 146.

(4) 7 Times L. R. 263

(5) (1870) L. R. 5 Q. B. Cas. 656, 659.

(6) (1848) 12 Q. B. 310.

(7) (1825) 3 B. & C. 601, 603.

Before formulating the questions which actually arise for decision, I will state the material facts. [His Lordship stated the facts as set out above.] Now, the plaintiff claims rectification of the company's register; and he bases his claim on the fact that he sub-underwrote 12,000 shares on reliance on the draft prospectus. He says that that prospectus in fact contains material misrepresentations which entitle him to the relief claimed. It is not suggested that the directors are guilty of anything in the nature of fraud or deceit. The plaintiff's case is based solely on the ground of misrepresentations made innocently.

In these circumstances, what are the questions which arise for decision? I think there are three—namely: (1.) Does the draft prospectus contain any material misrepresentation? (2.) If it does, did the plaintiff rely on the draft prospectus? and (3.) If he relied on the draft prospectus, is he entitled to any relief in the circumstances of the case, the application for the shares in question having been made not in the plaintiff's name but in the names of Mr. H. C. Mason and Captain Spencer Ovington?

I propose to deal with these questions in the order in which I have stated them. No. 1: Does the draft prospectus contain any material misrepresentation? As I have pointed out, the document to be considered is the draft prospectus marked Draft "A," dated November 28, 1927, for this is the only prospectus which the plaintiff ever saw.

The draft prospectus must be read as a whole. It states as a fact that the company has been formed to acquire as going concerns and carry on eight named greyhound racecourses, of which particulars are given. The named racecourses include those at Dublin and Belfast; these two racecourses are the racecourses which have the largest accommodation for spectators. The prospectus goes on to note: "The company is acquiring the benefit of all the above freeholds and leases," and under the heading of "Valuation," it sets out a letter from Messrs. Duncan B. Gray & Partners, Ld., with regard to the value of the property, in which it is stated that: "In accordance with your instructions, we have inspected the eight greyhound racing tracks which your company are purchasing." It then states the auditors' report, showing the profits earned from the various tracks for the period specified in the report, and it shows particularly the profits from each racecourse. The profits from Dublin and Belfast together amount to 24,200*l.* 14*s.* 6*d.*; the total profits for the eight tracks amount to 61,048*l.* 15*s.* 3*d.* Therefore, the Dublin and Belfast tracks together amount somewhere in the neighbourhood of two-fifths of the total profits. Then it sets out under the heading "Working Capital" that: "The total amount of cash to be received from this issue is 395,000*l.*, and after paying the purchase price of the courses, that is, 312,000*l.*, the preliminary expenses, underwriting and overriding commissions amounting to 39,500*l.*, there will remain a sum of 43,500*l.* for working capital and general purposes of the company which the directors consider adequate." It also sets out the minimum subscription. "The minimum subscription on which the company may proceed to allotment is fixed by the articles of association at seven shares, but as 1,164,000 of the shares offered for subscription have been underwritten, the directors will proceed to allotment upon the closing of the list." It then offers inspection of the various contracts which have been entered into, and states that various other underwriting contracts have been entered into, to which the company is not a party.

Now, reading this prospectus as a whole, I have come to the conclusion that the basis of the prospectus is that the company will start business with eight racecourses, including the two in Ireland, and that after acquiring the whole of the properties, the company will have a working capital of 43,500*l.* There is no suggestion that the company might in some circumstances only acquire some of the businesses, and the prospectus in fact invites subscriptions to a company which will carry on the eight racecourses, which is manifestly a different proposition to subscribing to a company which will only carry on some of those racecourses. No doubt the directors honestly thought that the arrangement which had been made justified the statements in the draft prospectus, but in fact those arrangements failed, and the company has never been in a position to acquire all the eight racecourses. The statements in the prospectus as to the company's business were therefore untrue. That they are material statements is plain from the fact that the Dublin and Belfast racecourses, which were to be acquired, were together earning about two-fifths of the total profits stated in the prospectus as having been earned by the eight racecourses which the defendant company was to acquire. I am, therefore, of opinion that the first question must be answered in the affirmative.

Now the second question is: Did the plaintiff rely on the prospectus? He has given his evidence very clearly and fairly, and he has stated that before offering to underwrite the 12,000 shares and authorizing the application for these shares, he read the draft prospectus carefully and considered the statements as to the profits earned by the eight racecourses and the available working capital, and he came to the conclusion that on this statement the proposition showed a reasonable prospect of a 12 per cent. to 13 per cent. return on his money if the public issue was unsuccessful, and he had to take up the 12,000 shares or any of them. Mr. Gavin Simonds, having regard to the way in which the plaintiff gave his evidence, really did not cross-examine him, and in his argument for the defendant company he very frankly admitted that he accepted the plaintiff's statement that in authorizing the application for the shares in question, he did so in reliance on the accuracy of the statements in the prospectus to which I have already referred. The second question, therefore, must also be answered in the affirmative.

The third question therefore arises, and it is this: Is the plaintiff in the circumstances of this case entitled to any relief? This question resolves itself into two heads, dependent on what the contract is that the plaintiff is asking to have rescinded. The statement of claim does not specify what the contract is of which rescission is asked, but in the course of the argument of the case, it became clear that there were two possible contracts. The first: The contract constituted by the resolution to allot 8160 shares to Mr. H. C. Mason and Captain Spencer Ovington on December 17, 1927, in response to their application attached to the sub-underwriting letter signed by them and addressed to Broad Street Investments, Ld., dated November 29, 1927; and the second, the contract constituted by the acceptance by the plaintiff of the renunciation by Mr. H. C. Mason and Captain Spencer Ovington of their rights under the allotment letter, and the authority of the defendant company to place the plaintiff's name in the share register, followed by the registration of the plaintiff as the shareholder in respect of the 8160 shares on January 21, 1928. So far as the first of these contracts is concerned the plaintiff can only be entitled to have this rescinded on the ground that Mr. H. C. Mason and Captain Spencer Ovington in fact entered into it as his agents. I am satisfied from the evidence that the company had no knowledge that the plaintiff was in any way concerned with the application for the shares in question on December 17, 1927, when the allotment was made, and, therefore, the plaintiff cannot be in any better position than that of an undisclosed principal, the company having no knowledge but that Mr. H. C. Mason and Captain Spencer Ovington were acting in any other capacity than as principals.

Now, what are the rights of an undisclosed principal in respect of a contract where the agency is unknown to the other party? The rights, I think, are accurately stated in Sir F. Pollock's Principles of Contract, 9th ed., p. 108. He says: "When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it as well as the agent with whom the contract is made in the first instance." But there are important limitations to this rule. The learned author points out a little lower down on the same page that the rule does not apply where the agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. In such a case the principal cannot afterwards sue on the contract; and for this statement he quotes the well known case of *Humble* v. *Hunter*. (1)

In the present case the contract results from the acceptance of the application for shares signed by Mr. H. C. Mason and Captain Spencer Ovington, and is an application for shares on the terms of the prospectus and of the memorandum and articles of association of the company. The articles of association of the company contain the usual provisions that the company shall be entitled to treat the registered holder of any shares as the absolute owner thereof (art. 14). In addition to this, in accepting a particular application, the company is from the very nature of the transaction entitled to consider the personality of the applicant before deciding to accept the application, and on both these grounds I think the application itself imports that it is made by Mr. Mason and Captain Spencer Ovington as the real and only principals. I am, therefore, of opinion that the plaintiff would be unable to sue on the contract between the company and Mr. H. C. Mason and Captain Spencer Ovington, and a fortiori he would be unable to sue for rescission of such contract. I should here point out that even if the plaintiff could sue on the contract, and so was in a position (as I think he would be) to sue for rescission, he would in such a case be subject to all equities in the same way as if the agents were the sole principals. In my opinion, the statement in Palmer's Company Precedents, 13th ed., vol. i., p. 180, to the effect that, "Where A. takes shares as agent for B., but without disclosing to the company the agency, B. cannot claim relief unless A. was deceived," is too broadly stated, and is not borne out by the cases there cited—namely, *Capel & Co.* v. *Sims' Ships Composition Co.* (2) and *Hyslop* v. *Morel*. (3)

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(1) 12 Q. B. 310.

(2) (1888) W. N. 97.

(3) 7 Times L. R. 263.

Of course, if the undisclosed principal cannot sue on the contract he could not obtain its rescission. In such a case the only person entitled to rescind would be the agent for the undisclosed principal, and in order to succeed in such a case the agent must necessarily prove that he was himself induced by the misrepresentations to enter into the contract.

It follows therefore that in my judgment the plaintiff cannot sue for the rescission of the contract between the company and Mr. H. C. Mason and Captain Spencer Ovington. This leaves the only question remaining—namely, can the plaintiff sue under the contract (if any), constituted by the acceptance by the defendant company of his authority to it, under the renunciation letter, to place his name on the share register ? In this aspect of the case I assume that the putting on the register of the plaintiff's name in pursuance of the renunciation letter and the authority signed by the plaintiff constitutes a contract. It is then essential to consider what the position is as between the defendant company and the plaintiff with regard to the representations relied upon. Those representations are contained in the draft prospectus which I have already referred to, and was issued before the defendant company was incorporated. The company can, in my judgment, only be responsible for these representations under one or other of the four heads enumerated by Romer J. in *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (1)

The four heads begin at p. 182 of the report, where the learned judge says : " It appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must bring his case within one or other of the following heads : (1.) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf—as, for example, by a prospectus issued by the authority or sanction of the directors of a company inviting subscriptions for shares ; (2.) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority—as, for example, by an agent specially authorised to obtain, on behalf of the company, subscriptions for shares. This head of course includes the case of a person constituted agent by subsequent adoption of his acts; (3.) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations—as, for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority; (4.) Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as, for example, if the directors of a company know when allotting that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors."

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(1) [1896] 1 Ch. 178, 182, 183.

It is said that the present case falls either within head 2 or head 4. What are the material facts here? The representations complained of were made to obtain the underwriting contract. The draft prospectus was passed on by the underwriters, Broad Street Investments, Ld., to the plaintiff through the Equitable Securities Company, Ld.; but neither the Broad Street Investments, Ld., nor the Equitable Securities Company, Ld., was the agent of the company specially authorized to obtain subscriptions for shares, and the company has not by any subsequent action adopted either the Broad Street Investments, Ld., or the Equitable Securities Company, Ld., as its agent for any such purpose. In my opinion, therefore, the case cannot be brought within head 2. Now can it be brought within head 4? There has been some controversy as to what the fourth head is. The fourth head, as stated by the learned judge in his judgment, is this: "Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that

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some of those representations were material and untrue." Then he gives as an example: "If the directors of a company know when allotting that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors." The example which the learned judge gives there I think explains what he means by the fourth head. It is I think made clear by what is said on p. 185, where he is referring to *In re Metropolitan Coal Consumers' Association; Karberg's Case* (1) in dealing with the particular case before him. He says this: "Lastly, this is not a case like *Karberg's Case* (1), or coming at all within the fourth head. The application for shares made by the plaintiff was not one made conditional upon, or to the knowledge of the directors based upon, any special or other representations. . . . ."

In my view the headnote of the report is inaccurate so far as it states what constitutes the fourth head. The fourth head in the headnote is in the following terms: "Where the contract is made on the basis of certain representations, whether the particulars thereof were known to the company or not, and it turns out that some of them were material and untrue." In my opinion the headnote should be amended in the manner stated in Buckley on the Companies Acts, 10th ed., p. 90, where the fourth head is stated thus: "Where the contract is made to the knowledge of the company or its agents on the basis of certain representations and it turns out that some of them were material and untrue." The learned author comments on the fourth head and says:—"In stating the fourth head, the author has varied the language of the headnote for the purpose of expressing, as he hopes, more correctly the effect of the learned judge's words. The instance which he gave of the fourth head is not apt, unless the words 'made on the basis' mean 'made to the knowledge of the company on the basis.' At the same time, if this is so, *Tamplin's Case* (2), if correctly reported, creates a

(1) [1892] 3 Ch. 1.

(2) [1892] W. N. 94, 146.

difficulty. Romer J. refused Tamplin relief on the ground that the directors did not know that he applied on the faith of the draft prospectus. The Court of Appeal are not reported to have found that the directors did know, and yet allowed the appeal on the ground that *Karberg's Case* (1) applied."

So far as this comment is concerned, I should point out that Romer J.'s judgment in *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (2) was subsequent to the decision of the Court of Appeal in *Tamplin's Case* (3), which was cited in the argument in *Lynde's* case. (2) *Tamplin's Case* (3) is only reported in the Weekly Notes, and for the purpose of this case I think I am entitled and indeed bound to proceed on the footing that *Tamplin's Case* (3) is not in fact correctly reported in the Weekly Notes, and to accept Romer J.'s decision in *Lynde's* case (2) as binding upon me.

Applying the fourth head in *Lynde's* case (2) to the present case, the fact has been established before me that at the time the plaintiff's name was entered on the register, the defendant company had no knowledge of the circumstances under which the renunciation by Mr. H. C. Mason and Captain Spencer Ovington in favour of the plaintiff had been made. The defendant company had no reason to suspect that the plaintiff was a sub-underwriter, or to think he was in any different position to that of a purchaser of the right of renunciation, and the defendant company therefore had no knowledge that, so far as the plaintiff was concerned, his application had been induced by any representations made before the company was incorporated.

In these circumstances I think the plaintiff fails to establish any right to have any contract to take the shares in question rescinded, and his action, therefore, fails.

There is a counterclaim for payment of the amount remaining due in respect of the calls—namely, 816*l*. The plaintiff's counsel has admitted that if the plaintiff fails in his action, he has no defence to the counterclaim. By the articles of association, calls in arrear are to bear interest from the date appointed for payment at the rate of 10 per cent. per annum. It is admitted that the date so appointed was January 17, 1928, and there will, therefore, be judgment for the defendant company on the counterclaim for 816*l.* with interest at 10*l.* per cent. per annum until payment. The plaintiff will pay the costs of the action and the counterclaim.

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(1) [1892] 3 Ch. 1.
(2) [1896] 1 Ch. 178.
(3) [1892] W. N. 94, 146.

A. R. T.

C. A. The plaintiff appealed. The appeal was heard on May 31, June 4 and 5, 1929.

Topham K.C. and *H. Wynn Parry* for the appellant. The plaintiff was throughout the principal in the contract to take shares, and Mason and Ovington were his agents. Luxmoore J. has held in the plaintiff's favour that there was a misrepresentation in the draft prospectus on which the plaintiff relied. It is true that effect was given to the transaction by Mason and Ovington's renouncing in favour of the plaintiff. But this was not a transfer of the shares but a renunciation of the right to become shareholders. There is nothing to prevent an undisclosed principal from taking the benefit of a contract entered into by his agent in a case where the person with whom the contract was made had no knowledge whether the agent was contracting as principal or agent: *Cooke* v. *Eshelby.* (1) There was nothing in the contract in the present case to import that Mason and Ovington were principals. The plaintiff was principal from the beginning, and it was his money that was paid. He is entitled therefore to rescind the contract on the ground of misrepresentation: see *Peek* v. *Gurney.* (2)

But even if the plaintiff cannot succeed as an undisclosed principal, the act of the company in registering the letter of allotment renounced in favour of the plaintiff amounted to a contract between the plaintiff and the company; and that contract was to take shares on the basis of the application signed by Mason and Ovington and therefore on the terms of the prospectus. The acceptance by the company of the plaintiff's offer to become a member shown by remitting the letter of allotment with a renunciation in his favour upon it, constituted a contract. That offer was made by the plaintiff on the faith of the prospectus, and on this ground also he is entitled to rescission. The plaintiff was the assignee of Mason and Ovington's contract that they should be members of the company on the terms of the prospectus. This case falls within the third proposition laid down by Lindley L.J. in *Karberg's Case*. (1) The prospectus was "the basis of the contract." The contract between the company and Mason and Ovington was a contract of allotment on the basis of the prospectus. As part of that contract Mason and Ovington were given power to renounce in favour of another. The acceptance by the plaintiff of the renunciation in his favour and the authorization to the company to place him on the register of shareholders were made on the same basis. The plaintiff took over the rights of Mason and Ovington, that is, he agreed to pay instalments of purchase money on the footing of the prospectus.

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(1) (1887) 12 App. Cas. 271, 275.

(2) L. R. 6 H. L. 377.

[RUSSELL L.J. The document would be the same if the plaintiff had never heard of the prospectus but bought these shares from Mason and Ovington on the market.]

The plaintiff accepted the renunciation of the rights of Mason and Ovington, whose contract to take the shares was based on the prospectus. If the plaintiff was not bound by the terms of the prospectus, then, apart from the question of misrepresentation, the company's counterclaim for calls ought to have failed.

[RUSSELL L.J. It is too late to say that after admitting liability on it in the Court below.]

That admission was made in the belief that the plaintiff contracted on the faith of the prospectus.

[LAWRENCE L.J. The payment of calls was provided for in the allotment letter.]

Yes, but not the payment of 10 per cent. interest, as claimed by the company. Leave is asked to withdraw the admission.

A person acquiring shares in a company on the faith of a draft prospectus issued before the company's incorporation can obtain rescission on the ground of misrepresentation: *Karberg's Case.* (1) Nor is it material that the directors are ignorant of the application being made on the faith of the prospectus: *Karberg's Case* (1); *Tamplin's Case.* (2) At least that is so when the person doing the act is constituted agent by subsequent adoption of his act: *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (3) Here the company did so by adopting the prospectus and the agreement with Mason and Ovington.

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(1) [1892] 3 Ch. 1, 11.

This case is also covered by the fourth head in Romer J.'s judgment (4): "Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue." In fact it is contended the directors knew of the draft prospectus and that the offer for shares was made on the faith of it. These cases are discussed in Palmer on Companies, 13th ed., vol. i., p. 180, and reference is also made to *Hyslop* v. *Morel* (5), which helps the plaintiff's case. The cases show that when a person applies on the faith of a prospectus issued before the company's incorporation, then if the prospectus is adopted by the company, he can sue for rescission on the ground of a misrepresentation contained in it. On the other hand, there is no such right on a transference of shares. This is a case between the two. The plaintiff is the undisclosed principal of the persons contracting for the shares. He entered into that contract by the agents and was misled by the misrepresentation in doing so. In such a case the principal can, it is contended, rescind. It is not essential that the agents should also have been misled: compare *Mayhew* v. *Eames.* (6) In any case there is nothing to show here that the agents were not misled.

Lionel Cohen K.C. (*Gavin Simonds K.C.* with him) for the company. Two points arise, first, whether Luxmoore J. was right in holding that there was a misrepresentation, and secondly, whether even if there was misrepresentation the plaintiff is entitled to sue in respect of it. The company contends that there was no misrepresentation, but it may not be necessary to go into this, though the right to do so, should there be an appeal, is reserved.

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(1) [1892] 3 Ch. 1.
(2) [1892] W. N. 94, 146.
(3) [1896] 1 Ch. 178, 183.
(4) [1896] 1 Ch. 183.
(5) 7 Times L. R. 263.
(6) 3 B. & Cr. 601.

As regards the second question, there are two contracts that the plaintiff contends he may be entitled to rescind. The first is the original contract entered into by Mason and Ovington, but this is a contract of the class which an undisclosed principal is not entitled to come forward and adopt: Pollock's Principles of Contracts, 8th ed., p. 106. The company had a right to reject any sub-underwriter, and it was essential therefore that the company should know who is contracting in that capacity. This is inconsistent with an undisclosed principal being allowed to adopt the contract: *Humble* v. *Hunter*. (1) It was there laid down that a man has a right to the benefit which he contemplates from the character, credit and substance of the person with whom he contracts. That is the principle underlying the decision in *Hyslop* v. *Morel*. (2) That the person underwriting was of importance here is shown by clauses 1 and 2 of the agreement of November 28, 1927. It follows that the undisclosed principal cannot sue in a case like this, unless the agents were misled, and it becomes a vital question whether the agents were misled by the alleged misrepresentation. It was for the plaintiff to discharge the onus of proving this, and he has failed to do so. He cannot therefore sue for rescission of the original contract. Further, it is submitted that even if the plaintiff had proved this, he still could not sue. The agents must be treated as the real principals.

Then it is said that a contract was made between the plaintiff and the company when the company accepted him as an assignee. No such contract arose till the company registered the plaintiff as a shareholder, and this was not entered into on the faith of the prospectus. The contract is created by the allotment, renunciation and nomination and the acceptance of the person nominated by the company.

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(1) (1848) 12 Q. B. 310.

(2) 7 Times L. R. 263.

That registration was effected on the footing that the plaintiff was a transferee of Mason and Ovington. The renunciation was merely a simplified mode of transfer, and there is no possible reference to the prospectus in any contract between the plaintiff and the company. The plaintiff does not bring himself within *Karberg's Case.* (1) For the prospectus to be the basis of the contract, it must be so to the knowledge of both parties. Here, as far as the company knew, the plaintiff stood in the position of an ordinary transferee.

[He was stopped.]

Topham K.C. replied.

Lord Hanworth M.R. In this case, which raises an important and interesting point, we have come to the conclusion that the judgment of Luxmoore J. is right. I should be prepared to leave the matter there, and to accept his careful judgment, but that I feel it is due, out of respect for the argument presented to us with great ability by Mr. Topham, that I should shortly state my reasons.

It is unnecessary to recapitulate the facts stated by the learned judge in his judgment, except to emphasize one or two features.

A prospectus had been issued at a time before the company was formed, and there was also an agreement made on November 28, 1927, between the trustees for the company and Broad Street Investments, Ld. The terms of that agreement were in effect that Broad Street Investments, Ld., were to be the underwriters of the complete capital of the proposed company. In terms it states that these underwriters, Broad Street Investments, Ld., are to be responsible for the whole of the capital. Para. 1 of that agreement states: "The underwriters will within three days after issue of the said prospectus either subscribe themselves on the terms hereinafter stated and on the basis of the said prospectus for One million one hundred and sixty four thousand of the said One million six hundred thousand Shares of Five shillings each or cause the same before the date aforesaid to be subscribed for on the terms of the said prospectus by responsible persons and/or companies who shall pay the application money payable on the said shares applied for by them respectively and shall not withdraw their applications before allotment provided that the underwriters shall not be responsible for any sub-underwriters whose names have been accepted by the company."

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(1) [1892] 3 Ch. 1.

Then para. 2 of the agreement is: "The company shall be deemed to have accepted as complying with the provisions of the last preceding clause any proposed subscriber whose name and address and the requisite application for the shares subscribed together with the deposit payable thereon are furnished by the underwriters to the secretary of the company and to which subscriber the company shall not take reasonable objection in writing within two days after receipt by the company of the aforesaid particulars."

That agreement was subsequently adopted by the company after it had been incorporated. To my mind its terms make two points plain. The first is that Broad Street Investments, Ld., were responsible for the full amount of the contemplated issue of capital, and secondly, that they could discharge themselves from that responsibility only by putting forward underwriters whose names should be accepted by the company; and in relation to the second point that the company had an opportunity of rejecting any particular candidate so put forward for the purpose of releasing Broad Street Investments, Ld., and that they could exercise their discretion as to whether or not they would take objection to the substituted underwriters or underwriter proposed by Broad Street Investments, Ld. It emerges, therefore, from that agreement that the character of the persons who were to be underwriters so put forward was of importance, and was not abandoned entirely by the company.

Mason and Ovington, being sub-underwriters, applied for shares. They had seen the prospectus, and on December 17, 1927, an allotment letter was sent to them in these terms: "I am instructed to inform you that, in response to your application the directors have allotted you 8160 ordinary shares in this company numbered " so and so. It is on that date that the company, which had been incorporated on December 12, in making its allotment, definitely allotted to Mason and Ovington these numbered shares. The letter showed that the immediate sum payable was 624*l.* Mason and Ovington, it is said, were acting as agents for the plaintiff, who having received that letter of allotment, sent a cheque for 624*l.* direct to the company's bankers, the Midland Bank. He sent that cheque on January 6, and on the 7th he received it back with the receipt for the 624*l.* noted by the stamp of the Midland Bank, which is dated January 7. The plaintiff, having thus paid the sum due on allotment, sends the whole of the allotment letter to the company on January 17: "I herewith enclose Allotment Letter No. U.W. 4/6 in respect of 8160 shares fully renounced in my favour. I shall be obliged if you will kindly let me have Allotment Letter in my name by return." The company did not issue any fresh allotment letter, but they replied on January 18 by the secretary. "I am in receipt of your letter of the 17th instant, and enclose herewith Allotment Letter in respect of 8160 shares in this company duly registered in your name, as desired." What they had done was this, they had put upon the allotment letter dated December 17 a stamp which says: "This allotment letter is registered under date 18th January." Mr. Collins had therefore got back from the company, and held in his hand, an allotment letter upon which he had paid the amount due on allotment. It was a letter which had been registered in the books of the company as being an allotment letter which had reached him, and it was also an allotment letter upon which there had been a renunciation signed by Mason and Ovington, who were the persons to whom the allotment letter itself was directed. At the time when they signed that renunciation they had not filled in the date; the date apparently was not filled in even at the time when Mr. Collins sent his cheque to the Midland Bank on January 6. It was not filled in until he wrote on January 17 to the company, when it was necessary for him to show that the interest of Messrs. Mason and Ovington had passed to him on a certain date. He filled in the date of January 16 before he enclosed the allotment letter in his letter of January 17. I have only added those few facts because I want to emphasize them for the purpose of what I intend to say.

Now the learned judge, on going into the facts, has held that there was an innocent misrepresentation in the prospectus, and he has found that the plaintiff relied upon the terms of the prospectus. The prospectus was adopted by the company upon its incorporation, and although in this Court the question whether or not there was a misrepresentation has not been discussed, it is a matter which Mr. Lionel Cohen has desired to keep open. But there is no question that upon that prospectus, whether it in fact contained a misrepresentation or not, the plaintiff did rely. For the purposes of the present judgment, it is right to accept the view arrived at by the learned judge, that the prospectus did contain an innocent misrepresentation. It is said on behalf of the plaintiff as appellant that upon these facts he is entitled to have the contract set aside and the company ordered to rectify the register by removing his name from it.

The first point on which the plaintiff relies is that he was the undisclosed principal, and entitled to enforce his rights as a principal of Mason and Ovington, who applied for the shares on his behalf, and obtain a release from the contract on the ground of misrepresentation. Mason and Ovington have not given any proof that they relied upon any misrepresentation. They were both called, and they have not proved that they were misled by any misrepresentation at all. The question therefore arises whether, upon this contract made between them as agents (so it is said) for an undisclosed principal and the company, the undisclosed principal can come and set up the fact that he had acted upon a misrepresentation contained in the prospectus.

I have come to the conclusion that upon what I may call the principal and agent point, it is impossible for the plaintiff to establish his case. I think the learned judge was right in saying that the rule stated in Sir Frederick Pollock's Principles of Contract, 8th ed., p. 106, applied: "When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it as well as the agent with whom the contract is made in the first instance." But that does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal.

Let us consider for a moment what was the position of the company vis-à-vis Mason and Ovington at the time the allotment letter was sent out. By sending out the allotment letter, they released, pro tanto, Broad Street Investments, Ld., from their liability under the adopted agreement, and were no longer able to call upon Broad Street Investments, Ld., in respect of those 8160 shares. For that purpose it was necessary for the company to form an opinion as to whether or not they should take a reasonable objection within a limited time to the sub-underwriters who were put forward as being responsible persons. It appears to me that there was just that element in the contract as between the company and Mason and Ovington which did require that Mason and Ovington should be taken for this purpose to be the persons with whom the company were contracting.

The question of the knowledge of the agent, or the position of the agent and the position of the principal of course introduces very difficult questions. But, as stated by Lord Halsbury, in the well known case of *Blackburn, Low & Co.* v. *Vigors* (1), it is too loose to talk of principal and agent as if those words necessarily connoted in all cases the same relation. "When a person is the agent to know, his knowledge does bind the principal." But that must be shown to be one of the characteristics of the agent. Equally the employment of the agent in a particular matter may be so restricted that you cannot introduce the loose suggestion that the rights of the principal and the agent are interchangeable.

(1) (1887) 12 App. Cas. 531, 537 et seq.

In the present case it appears to me that the contract between the company and Mason and Ovington was one in which importance attached to the personality of the persons with whom the company were contracting. In such a case it is not right to treat the agents as necessarily interchangeable with their principal so as to enable the principal to come forward and seek to disaffirm the contract on the ground of a misrepresentation on which he alone had relied. I think that disposes really of the question of the prospectus, for Mason and Ovington have given no proof that they were deceived by any misrepresentation, and the contract that was made on the basis of the prospectus was, to my mind, the contract that was made by means of the allotment letter sent on December 17.

Different considerations apply to the other ground upon which an argument has been presented on behalf of the plaintiff. When the letter of allotment containing the renunciation was forwarded to the company on January 17, the plaintiff asked that he should have an allotment letter in his name. I do not pause to consider precisely the nature of that application ; but what he did receive was an indication that the renunciation in his favour had been accepted by the company, and the allotment letter registered in his name in the books of the company. But what was the nature of his position upon the renunciation ? It is said that what had been renounced was the contract that had been made on December 17 with Mason and Ovington, and that all rights which they might have had have passed to him. In terms, what is given is this : "We hereby renounce our rights to the within-named shares, and nominate Mr. Collins to have all the benefits thereof"—that is, of the shares. It appears to me, when this allotment letter is examined, that it shows a contract between the company and Mason and Ovington to place them on the register and issue a certificate for shares when the full sums are paid. The right which they have, is a right to certain shares. The contract appears to be complete between the company and Mason and Ovington, a contract the fruit of which is shares, and it is those shares which are assigned or renounced to the plaintiff, without a transfer deed, it is true, but that is because by the structure of the contract a transfer deed did not become necessary until a later date.

I do not think it can be said that the acceptance at that date of the plaintiff was an acceptance by the company of the plaintiff on the basis of the prospectus. No reference is made to the prospectus. The events which had taken place since the company had become responsible for the prospectus were of very considerable importance; and all that is tendered by the plaintiff is a renunciation letter of the shares and an application by him that he should be accepted as holder of the shares, and the answer is: "Yes, you shall be the holder of the shares, and we register that application."

I do not see that it is possible in face of what had been renounced in the plaintiff's favour to go back to the original issue of the prospectus, and to treat the proceedings which took place between the company and the plaintiff as being based upon the terms of the prospectus. It appears to me that it is much more like cases such as *Peek* v. *Gurney* (1), where after shares have been allotted a third party has become possessed of those shares either by a transfer or by assignment, and in relation to the company I cannot find that the contract entered into on January 17 was on the basis of the prospectus.

It is to be observed that for the purpose of the nexus between the company and the plaintiff to whom the shares were renounced, it does not seem to be vital to consider when the actual registration of the shares took place. It appears to me there was a contract, it may be by novation. Thus in *Hyslop* v. *Morel* (2) Chitty J. said: "The company placed Hyslop on the register, but it was clear that the title to these shares was derived from Morrison. It was also clear that Morrison was not misled. Morrison could not set aside the original contract, and clearly Hyslop could not now set aside the contract, for he claimed to do so through a person who was not misled." It is clear that the emphasis there is not

(1) L. R. 6 H. L. 377. (2) 7 Times L. R. 263.

laid upon the question of registration, but upon the source and means whereby Hyslop became entitled to ask for registration.

It appears to me, therefore, for these reasons that the learned judge was right, and that Mr. Collins is not in a position to establish as against the company that the prospectus became the basis of the contract which was reached in January between him and the company, and thus that he is not entitled to enforce his claim to be removed from the register of shareholders.

For the reasons stated by Luxmoore J. and for the reasons I have added, this appeal must be dismissed with costs.

Lawrence L.J. But for the forcible and able argument of Mr. Topham on behalf of the appellant I should have contented myself with simply expressing my agreement with the judgment delivered by Luxmoore J. In deference to Mr. Topham's argument, however, I will state quite shortly my reasons for concluding that this appeal fails.

Mr. Topham has presented the case in two fundamentally different aspects. His first contention was that the plaintiff was throughout the undisclosed principal and as such entitled to sue for rescission of the contract made between the company and Messrs. Mason and Ovington on the ground of misrepresentation in the prospectus, on the statements in which that contract was admittedly based. In my judgment this contention fails, and I agree with the learned judge that Messrs. Mason and Ovington contracted in such terms as to imply that they were the real and only principals. The directors of a company owe a duty to their fellow members and to the company to see that an applicant for shares is a responsible and fit person to become a member: none the less so because the applicant may in fact turn out to be an underwriter or sub-underwriter and may have applied for the shares on behalf of a client of his. The directors are not bound to accept as the applicant for shares an unknown person because he happens to be a client of an underwriter or other agent and thus be deprived of the opportunity of seeing whether the applicant is a fit and proper person to become a member of the company. A contract to become a member of a company is, in my opinion, one of that class of contracts in which an undisclosed principal cannot insist on taking the place of a party apparently contracting on his own account. In the circumstances therefore the plaintiff, who was not known to the company to be a party or privy to the contract between it and Messrs. Mason and Ovington, cannot rely upon a misrepresentation contained in the prospectus as ground for rescinding that contract, at all events without proving that Messrs. Mason and Ovington in applying for the shares relied upon and were misled by that misrepresentation. There is no such proof in the present case.

Mr. Topham's second contention was that a new contract was created between the plaintiff and the company, and that this contract was induced by the misrepresentations contained in the prospectus. This new contract is said to be constituted by the acceptance by the company on January 18, 1928, of the renunciation and nomination signed by Messrs. Mason and Ovington in respect of their rights to the shares allotted to them in favour of the plaintiff and the latter's acceptance of such nomination. For the purposes of my judgment I will assume that such a contract was then constituted, although I think there is a good deal to be said for the view presented by Mr. Lionel Cohen that no contractual relationship between the plaintiff and the company was constituted until the plaintiff was placed on the company's register of shareholders. Assuming however that there was such a contract, there is no evidence to show that the company made any representation to the plaintiff by the prospectus or otherwise to induce him to enter into such contract or that the company knew that he had ever seen the prospectus. The prospectus, as a matter of fact, ceased to function before the date of any such contract, and in the absence of evidence to the contrary it is not to be presumed that the company would make fresh contracts on the basis of the prospectus after it had achieved the object for which it was issued and the company had allotted all the shares applied for under it. The prospectus is not mentioned in terms in the allotment letter, and I think it would be too far fetched to imply that the statements in the prospectus formed the basis of the alleged new contract between the plaintiff and the company by reason of the reference in the letter of allotment to the application made by Messrs. Mason and Ovington.

For the reasons stated I agree that the appeal fails and ought to be dismissed with costs.

Russell L.J. I have come to the same view. I find myself in agreement with the learned judge's decision on what he has called the third question. In my opinion, the plaintiff became a shareholder in this company not by reason of any contract between himself and the company, but by reason of a contract between Mason and Ovington and the company. He assented to his name being put upon the register of shareholders by the direction of Mason and Ovington. In my opinion, rescission of that contract between the company and Mason and Ovington could only be obtained at the suit of Mason and Ovington, and upon proof of an allegation that Mason and Ovington had been misled by the prospectus. Both those elements are absent in the present action. If, contrary to this view, the plaintiff became a shareholder in the company, by virtue of a contract between himself and the company, a contract somehow constituted by the secretary having entered in the books of the company a receipt of a form of acceptance signed by the plaintiff, then there is no ground shown for rescinding that contract, because that contract is in no way expressed to be made upon the faith or subject to the terms of the prospectus. It contains no reference to the prospectus at all, and there is no suggestion in the evidence or the documents in this case that the company knew either that the plaintiff was applying in reliance upon the prospectus or that the plaintiff, in fact, ever saw the prospectus at all.

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For these reasons I am of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Forsyte & Kerman: O'Shaughnessy & Wills.*

H. C. G.

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C. A.
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Vendor and Purchaser—Specific Performance—Conveyance in Fee to joint Tenants—Beneficial Owners—Purchasers become statutory Trustees for Sale—Power of Attorney given by one Owner—Refusal of Tender of Conveyance executed by Attorney—Delegation—Rescission—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 36, *Sch. I., Part IV.*

An estate was purchased in 1925 by two partners and conveyed to them as joint tenants in fee simple. By virtue of the Law of Property Act, 1925, s. 36, they became on January 1, 1926, statutory trustees for sale. In 1926 they entered into a contract to sell a freehold reversion forming part of the estate, but the purchase was left uncompleted for two years. In 1928 J. H. G., one of the joint owners, gave a general power of attorney to R., authorizing him to sell and convey any property belonging to the donor whether solely or jointly with any other in the county of L., including the above estate. The vendors having tendered a conveyance of the reversion executed by one of them and by R. as attorney for the other, the purchaser refused to accept it, and the vendors then sued for specific performance. The purchaser counterclaimed for a rescission of the contract:—

Held, by Eve J., that the power of attorney given by J. H. G. to R. amounted to a complete delegation of the trust created by operation of law, and that, the vendors having contracted to sell as statutory trustees. the delegation was invalid. The vendors could not therefore compel the purchaser to accept the conveyance tendered and their action failed. The defendant was entitled to judgment for rescission of the contract with repayment of his deposit.

Held, by the Court of Appeal (dismissing the appeal), that on the true construction of the power of attorney it conferred no power on the attorney in respect of land held by J. H. G. as trustee for sale.

Action.

The plaintiffs, J. H. and F. W. Green, in 1925, purchased a large block of freehold property in and near Bury, Lancashire, part of Lord Derby's settled estates. They were partners in the venture and the property was conveyed to them, their heirs and assigns as joint tenants free from all the limitations, powers and provisions of the Derby settlements. The plaintiffs proceeded to realize the land purchased by them, and had sold a considerable amount before 1928.

On August 16, 1928, the plaintiff, J. H. Green, who was then suffering from illness and expected to be incapacitated from doing any business for some time, executed a power of attorney under seal to J. F. Rowlatt, appointing him his attorney to have sole and absolute control of all his property, real and personal, at Bury or elsewhere in the county of Lancaster, and whether owned solely or jointly with any other person, and to sell and dispose of such real and personal estate, or of his interest therein or any part thereof, at his (the attorney's) sole and absolute discretion and to make, execute and do all necessary deeds, acts, and matters in the law and to receive all purchase moneys. The power was to be irrevocable for twelve months from its date.

The plaintiffs had in October, 1926, contracted to sell to the defendant a freehold reversion, subject to the unexpired portion of a term of ninety-nine years at Nos. 1 and 3 St. Mary's Gate, Bury, being part of the estate purchased by them, but completion was delayed by the purchaser for two years. In July, 1928, the vendors began to press for completion. The purchaser having investigated the title, accepted it and submitted a draft conveyance, which was approved by the vendors. The purchasers' solicitors having sent the engrossment of the conveyance for execution, the vendors tendered it to them executed by the plaintiff, F. W. Green, and by J. F. Rowlatt as attorney for J. H. Green. At that date J. H. Green had not been able to execute a lease or conveyance for some twelve months, and a number of sales had been effected, the purchasers accepting execution of the conveyance by his attorney under an earlier power. The purchaser's solicitors then made the following requisitions on the vendor: (1.) that there must be a written statement in or at the foot of the conveyance to Major Whitehead, or

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separately signed by the vendors, stating that they were solely beneficially entitled. (2.) There must then be evidence of assent by the plaintiff, F. W. Green (i.) to the appointment of J. F. Rowlatt as attorney under the power of attorney given to him by J. H. Green; (ii.) to the receiving of the purchase money by J. F. Rowlatt on behalf of the vendors.

The vendors refused to comply with these requisitions and commenced this action for specific performance. The defendant counterclaimed for rescission.

Charles Harman for the plaintiffs. Under the conveyance to them in 1925 the plaintiffs are entitled to the property as joint tenants and as beneficial owners. Under s. 36 of the Law of Property Act, 1925 (1), they become statutory trustees for sale as if they were tenants in common. That brings in Sch. I., Part IV., s. 1, sub-s. 2. (1) It is suggested by the defendants that the effect of the Act is to make it impossible for the plaintiffs or either of them to convey by attorney, on the ground that it would be a delegation of a trust vested in a trustee. That might be so, if the plaintiffs were trustees for beneficiaries other than themselves, but if, as here, they are trustees for themselves alone they can agree between themselves, as having the full dominion over the property, to appoint an attorney to act for one of them.

It has never been conveyancing practice for the purchaser to demand a statutory declaration that the vendors are still beneficial owners at the moment of sale, if the abstract shows that they are beneficial owners. See Encyclopædia of Forms and Precedents, Supplement for 1928, p. 11, where a form of power of attorney by beneficial joint tenants is given. Under s. 23 of the Trustee Act, 1925, trustees have power to appoint agents to transact any business required to be done, and Mr. Rowlatt, the attorney in this case, is such an agent. There is a limit on the incapacity of trustees to delegate their powers, and the authorities show that the appointment of an attorney or proxy is not always a delegation: see Lewin on Trusts, 13th ed., p. 231, and *Attorney-General* v. *Scott*. (1) The conveyance of a bare legal estate is a purely ministerial act which trustees can perform by attorney: *In re Hetling & Merton's Contract*. (2)

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(1) By the Law of Property Act, 1925, s. 36: "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity."

By Sch. I., Part 4: "1. Where immediately before the commencement of this Act land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect . . . ."

"(2.) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall by virtue of this Act vest in them as joint tenants upon the statutory trusts."

The Law of Property Act, 1925, has not curtailed the powers of beneficial owners to deal with their property in any manner they please.

Ronald F. Roxburgh for the defendant. The effect of the Law of Property Act is by the operation of s. 36 to bring in Sch. I., Part IV. The plaintiffs having become trustees for sale cannot proceed to convey as beneficial owners. The abstract is not evidence that the vendors are beneficial owners. It is a perfectly proper abstract for trustees selling, and the defendant has only asked for a letter stating that the plaintiffs are still the only beneficial owners. The power of attorney given by Mr. J. H. Green is insufficient; there must be a joint authority from both plaintiffs to pay the purchase money to Mr. Rowlatt as their solicitor.

The form of conveyance does not show that the vendors are solely beneficially interested in the proceeds of sale. They only purport to convey as beneficial owners for the purpose of implying a statutory covenant for title; in fact they must convey as trustees in exercise of the statutory trust for sale.

If the conveyance tendered is one made by the vendors as trustees for sale, it is badly executed, as there has been a delegation of the trust. Assuming the plaintiffs are trustees it is wholly immaterial, for the purposes of delegation, where the beneficial interest may reside. The definition of "trustee" in the Trustee Act, 1925, s. 68, sub-s. 17, includes the statutory trustees for sale. The statutory trust involves a discretion, as it includes power to postpone the sale of the property (s. 25). If it involves a discretion the trust is not a matter of merely ministerial action.

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(1) (1750) 1 Ves. Sen. 413, 417.

(2) [1893] 3 Ch. 269.

The case does not come within s. 23 of the Trustee Act, 1925, for several reasons. The power of attorney is not so worded, and it is not under seal. The authority to execute a deed must be given under seal. Lindley L.J.'s proposition in *In re Hetling & Merton's Contract* (1), that he had no doubt that a trustee could execute a deed by an attorney would not now be law having regard to s. 23 of the Trustee Act, 1925. The power of attorney does not authorize the giving of a receipt or discharge for the purchase-money.

The section is mainly intended to protect a trustee against his beneficiaries, but does not protect a stranger against a trustee. Finally, it can only authorize a very limited delegation. Sect. 25 admittedly has no application. There is therefore here no authority to delegate, and if there were, the power does not authorize any dealings with property held by the vendor as a trustee.

Harman, in reply, referred to s. 69 of the Law of Property Act, 1925.

Cur. adv. vult.

July 12. EVE J. In 1925 the two plaintiffs purchased a very large block of Lord Derby's Settled Estates at Bury in the county of Lancaster, and by an indenture dated May 11 in that year the same was assured to them, their heirs and assigns as joint tenants free and discharged from all the limitations, powers and provisions of the settlements and from all estates, interests and charges then subsisting or to arise thereunder. By virtue of s. 36 and Part IV. of Sch. I. of the Law of Property Act, 1925, such of the hereditaments so purchased as were still retained by the plaintiffs on January 1, 1926, were vested in them upon the statutory trusts for sale, and in October, 1926, they agreed to sell and the defendant to purchase the freehold reversion expectant on the determination of a lease for ninety-nine years of and in the messuages and premises at Bury, the subject-matter of this action, and part of the premises included in the conveyance of May, 1925, and, as explanatory of the delay which has taken place in completion, I ought perhaps to add that it was thereby agreed that if the purchase was not completed on the date therein mentioned the vendors in lieu of interest on the balance of the purchase money should accept the rent reserved by the lease up to the actual completion. A satisfactory title having been deduced the draft conveyance was submitted for the vendors' approval on August 28 and returned approved on August 31, 1928. It recites that the vendors are seized for an estate of inheritance in fee simple in possession subject to the lease, but free from incumbrances, of the property in question, but by virtue of the Law of Property Act, 1925, hold the same in trust for sale, and by the operative part the vendors "in pursuance of such trust for sale" as beneficial owners (but so as to make each of them liable by way of damages in respect of any breach of covenant for title thereby implied to the extent of one half only of such damages) thereby convey the premises to the purchaser in fee simple. This conveyance was executed by Mr. F. W. Green in person, and by Mr. John H. Green "by John Friend Rowlatt his attorney," Mr. Rowlatt's authority being a power of attorney dated August 16, 1928, whereby he was empowered and authorized by Mr. J. H. Green "as my attorney and in my name or otherwise to have the sole and absolute control of all my property real and personal of every description situate and being at Bury or elsewhere in the county of Lancaster and whether owned by me solely or jointly with any other person or persons and to sell and dispose of such real or personal estate or any part thereof and of any estate and interest therein that I may possess at his sole and absolute discretion and to make execute and do all necessary deeds acts and matters in the law exactly as I myself could execute and do them and to receive all purchase and other monies in my name or otherwise and his receipt shall be a sufficient discharge to all persons having dealings with the said John Friend Rowlatt on the authority of this power of attorney which shall not be revoked or revocable for 12 calendar months from this date." The purchaser declined to accept the conveyance as tendered on the ground that Mr. J. H. Green had not appointed the attorney merely to pass the legal estate and thereby complete a transaction which his principal had conducted down to that point, but had in substance delegated all matters relating to the trust, including the execution of the trust for sale, to the attorney. The vendors insisting that the objection to the deed was not sustainable, thereupon brought this action to enforce the contract, alleging that they were and always had been ready and willing to complete. By his defence the defendant traverses this allegation and avers that, although he has at all material times been and still is ready and willing to complete, the plaintiffs have refused and still refuse to procure the execution by the plaintiff John H. Green of the conveyance and have disclosed no right or title in any other person to convey on behalf of that plaintiff and are therefore unable or unwilling to perform their part of the agreement, and he counterclaims for specific performance, or alternatively, for rescission and the usual ancillary relief. By way of defence to the counterclaim the plaintiffs plead and rely on the power of attorney.

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(1) [1893] 3 Ch. 280.

The sole question, therefore, in the action is whether the defendant is right in the objection raised on his behalf to the conveyance as tendered. In my opinion he is. That the contract is one entered into in execution of the statutory trust is, I think, incontrovertible; the conveyance recites that the vendors hold the premises under the statute upon trust for sale and they convey "in pursuance of such trust for sale." In these circumstances it cannot be regarded otherwise than as a sale by them as trustees. Assuming in favour of the plaintiffs that the power of attorney which relates to "all my property in Bury and elsewhere in the county of Lancaster whether owned by me solely or jointly with any other person" extends to property held by the grantor as one of two trustees for sale, its operation is to commit to the sole and absolute discretion of the grantee all those matters in which the trustee is bound to exercise his own judgment and to use his own discretion and to authorize the grantee to receive purchase and other monies representing the trust estate in the name of the grantor or otherwise. It is hardly possible to conceive a more complete delegation of the duties, powers and discretions of the trustee.

Is such a delegation permissible ? I think not. Sect. 23 of the Trustee Act, 1925, no doubt gives to the trustees enlarged and somewhat wide powers of employing agents, including (sub-s. 2) an agent for the purpose of selling, converting, collecting, getting in and executing and perfecting (what is printed in the Act as "insurances"—obviously a misprint for "assurances") assurances of or managing or cultivating or otherwise administering any property real or personal movable or immovable subject to the trust in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property with such ancillary powers and with and subject to such provisions as they may think fit, including a power to appoint substitutes, but giving the section the liberal construction which it was doubtless intended to bear I do not think it is possible to extract from it any corresponding authority to depute similar powers to an agent or attorney in respect of trust property within the United Kingdom. It follows that in my opinion the plaintiffs cannot compel the defendant to accept the conveyance they have tendered, and their action fails and must be dismissed with costs. Upon the counterclaim, if it be the fact that the plaintiffs cannot obtain Mr. J. H. Green's execution of the conveyance, the defendant is entitled to judgment rescinding the contract, to repayment of his deposit with 4 per cent. interest, and to recoupment of the costs incurred by him in investigating the title. The plaintiffs must pay the costs of the counterclaim.

It has been argued that the plaintiffs can make a title as sole beneficiaries under the trusts for sale and that the defendant ought to accept the title that has been disclosed as establishing a good and satisfactory title in them as beneficiaries. The short answer to that argument is that the plaintiffs have contracted with the defendant as trustees and he cannot now be called upon to substitute and carry out another contract. If, however, the plaintiffs now desire to make a title as sole beneficiaries under the trust for sale I gather from the correspondence, and in particular from the letter of December 6, 1928, that the defendant will be satisfied if Mr. F. W. Green will comply with some very moderate requirements, but this is a matter for the parties to determine and does not come within the purview of my judgment. Nor does the question whether a purchaser from the plaintiffs as sole beneficiaries could reasonably require some proof that they are in fact such sole beneficiaries, but as the matter was debated in the course of the arguments, I may perhaps express the opinion that a purchaser in such circumstances, who, of course, has notice that the hereditaments are held by the vendors on a statutory trust for sale, might reasonably require to be satisfied that the vendors were in fact at the date of the contract the sole beneficiaries.

H. L. L.

The plaintiffs appealed. The appeal was heard on October 21, 1929.

C. A. Bennett K.C. and *Charles Harman* for the appellants.
Ronald F. Roxburgh for the respondent.

The Court (LORD HANWORTH M.R., LAWRENCE and RUSSELL L.JJ.) dismissed the appeal on a ground not calling for full report—namely, that on the true construction of the power of attorney dated August 16, 1928, it conferred no power on the attorney in respect of land held by the plaintiff J. H. Green as a trustee for sale.

Appeal dismissed.

Solicitors: *Torr & Co.; Pritchard, Englefield & Co., for Butcher & Barlow, Bury, Lancashire.*

H. C. G.

In re ATKINSON.

WEBSTER *v.* WALTER.

[1929. A. 719.]

CLAUSON J.
1929
July 4.

Administration—Order of Application of Assets—Solvent Estate of deceased Testator—" Property Undisposed of by Will"—Applicable towards Discharge of Debts etc., subject to the Provisions in the Will—Lapsed Devise of Real Estate—Provision in Will for Payment of Debts, etc., out of Personal Estate —Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II., cl.* 1.

In the administration of the solvent estate of a testator who died after the commencement of the Administration of Estates Act, 1925, a direction in his will to the trustees to pay his funeral and testamentary expenses and debts out of the proceeds of the sale and conversion of his personal estate is a provision within the meaning of s. 34, sub-s. 3, of that Act. Its effect is to make the personal estate applicable towards the discharge of the testator's funeral, testamentary and administration expenses, debts and liabilities payable out of his estate (except death duties imposed on real estate) in priority to the testator's real estate which, owing to the death of the devisee thereof in the testator's lifetime, was property undisposed of by his will and which, but for the provision in his will, would be primarily liable according to the order of application of assets specified in cl. 1 of Part II. of the First Schedule to the Administration of Estates Act, 1925.

ADJOURNED SUMMONS.

By his will, dated September 15, 1921, William A. Langdale Atkinson, after appointing executors and trustees thereof, devised all the lands and hereditaments which he could at his death dispose of by will to his brother Herbert Swainson Atkinson absolutely. He then bequeathed all his personal estate to his trustees upon trust for sale and conversion and upon trust that they should out of the moneys produced by such sale and conversion and of any ready money pay his funeral and testamentary expenses and debts and the legacies bequeathed by any codicil and should stand possessed of the residue of the moneys in trust as to one-third part thereof for his sister Susan M. Atkinson, as to one other third part for his sister Ella L. Atkinson, and as to the remaining one-third for his friend Florie May Walter.

The testator died on June 28, 1928, without leaving any issue, but leaving surviving him his wife Amy Atkinson (who died on December 17, 1928), his mother Margaret Atkinson and his two sisters named in his will. His brother Herbert Atkinson, the specific devisee named in his will, died before the testator—namely, on February 3, 1927. The value of the testator's real estate was more than 8000*l.*, while that of his personal estate was about 576*l.* His funeral expenses and debts amounted to about 680*l.*

The summons, which was taken out by the trustees of the will, asked for the determination of the question whether, upon the true construction of the will and in the events which had happened, the personal estate of the testator was applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable out of his estate (other than the death duties imposed on his real estate) in priority to the real estate of the testator undisposed of by his will.

C. D. Myles for the plaintiffs [after stating the facts :] This testator died partially intestate, and by the joint operation of s. 49, s. 55, sub-s. 1 (vi.), of the Administration of Estates Act, 1925, the testator's undisposed of real estate became subject to a trust for sale (see s. 33, sub-s. 1 (*a*), of the Act). Then under sub-s. 2 of s. 33, the proceeds were (subject to the provisions of the will : sub-s. 7) applicable for payment of debts, etc., having regard to the rules of administration contained in Part III. of the Act. The undisposed of real estate then became distributable as part of the residuary estate of an intestate and in the events which happened, according to s. 46, sub-s. 1 (iv.), of the Act. The estate being solvent s. 34, sub-s. 3, of the Act (1) applies, and subject to the provisions, if any, contained in the will, the testator's assets are applicable towards the discharge of his debts, etc., in the order prescribed in Part II.

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(1) Sect. 34, sub-s. 3, of Administration of Estates Act, 1925 : "Where the estate of a deceased person is solvent his real and personal estate shall, subject to . . . . and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

to the First Schedule to the Act. (1) The question is whether the direction in cl. 1 of Part II., which makes the testator's real estate undisposed of by his will primarily applicable, is affected by the direction in his will for payment of his debts, etc., out of the proceeds of his converted personal estate.

John H. Boraston for the defendant Florie May Walter. The order of application of the testator's assets laid down in Part II. of the First Schedule to the Act is to be applied; and, accordingly, his undisposed of real estate is the first fund applicable. The direction in the will to pay debts, etc., out of the proceeds of his converted personal estate is not a provision contained in the will sufficient to exclude or vary the order of application laid down in Part II. Under cl. 1 of Part II. the debts, etc., are in effect made a charge upon the undisposed of real estate. The testator died possessed of that real estate so charged by the Act, and no contrary intention is signified by his will to take the case out of s. 35 of the Act. The present is covered by the principle of *In re Lamb* (2), where there was a direction to the executors and trustees of the will to pay debts which had not the effect of altering their incidence. *In re Petty* (3) was a different case: there the lapsed moiety of residue was not primarily liable, because that moiety could not be ascertained until after payment of debts, etc., rateably out of both the moieties.

H. W. Dollar for the defendants Susan and Ella Atkinson, supported the previous contention.

Wilfrid Hunt for the defendant Margaret Atkinson. There is a provision contained in the will for payment of debts, etc., out of a particular fund—namely, the proceeds of sale of the personal estate. That is a provision which is sufficient to exclude the statutory order of application which, but for the provision in the will, would make the undisposed of real estate the primary fund to be applied.

CLAUSON J. [stated the facts and continued:] The question I have to decide is in what order are the testator's

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(1) " Order of application of assets where the estate is solvent." Clause 1: " Property of the deceased undisposed of by will. . . ."

(2) [1929] 1 Ch. 722.

(3) [1929] 1 Ch. 726.

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assets applicable towards the discharge of his funeral, testamentary expenses and debts. Although he died after the commencement of the Administration of Estates Act, 1925, with the consequence that in administering his estate the provisions of that Act relating to the order of the application of his assets must be applied, yet in construing the will regard must be had to the law in force at the time of its execution, that is, before the alterations in the existing law were made by the new Act.

The testator died leaving a solvent estate, as his real and personal estate together were more than enough to discharge his debts and other liabilities. Therefore s. 34, sub-s. 3, of the new Act became applicable, under which—subject to the provisions, if any, contained in the will—his real and personal estate are to be applied towards the discharge of the debts, etc., payable thereout, in the order mentioned in Part II. of the First Schedule to the Act, according to which, property of the deceased undisposed of by his will is applicable for that purpose in priority to any other of his assets. It was decided in *In re Lamb* (1), a decision by which I feel myself bound, that "property undisposed of by will" referred to in cl. 1 of Part II., was not to be confined to cases where no attempt was made by the testator to dispose of it by his will, and therefore included a share of residue which had lapsed by reason of the death of the legatee in the testator's lifetime. Accordingly, here, the testator's brother to whom he had devised his real estate, having died in his lifetime, the real estate so devised was property undisposed of by will within the meaning of cl. 1 of Part II. It has been contended on behalf of the residuary legatees that, by force of the new Act, the debts were made primarily payable out of the undisposed of real estate. On the other hand, it was contended on behalf of those who would take the undisposed of property that, before the provisions of Part II. can be applied, regard must first be had to the provisions, if any, contained in the will. The question then is whether there is to be found in the will any provision which has the effect

(1) [1929] 1 Ch. 722.

of altering the statutory order of application and putting some other assets of the deceased in front of the undisposed of real estate. In *In re Lamb* (1) there was no such provision to be found in the will; and in *In re Petty* (2) a mixed fund was created for payment of debts, etc., and there was there no undisposed of moiety of the balance of residue until the debts had been paid. Here the will contains a clear direction to the trustees to convert the personal estate and out of the moneys produced by such conversion to pay his funeral and testamentary expenses and debts: until that provision is worked out there is no necessity to have recourse to Part II. of the First Schedule to the Act. The conclusion I have reached, independently of any authority (except on the point as to the lapsed real estate being property undisposed of by will, within the meaning of cl. 1 of Part II.), is that the trustees must convert the personal estate into money, and out of the proceeds of the conversion pay the funeral and testamentary expenses, debts and liabilities payable out of the estate of the deceased (except death duties imposed on the real estate) in priority to the real estate undisposed of by the will; and I will make a declaration to that effect.

Solicitors: *Arkcoll, Barraud & Chadwick, for Talbot, Rheam & Webster, Milnthorpe; Vizard, Oldham, Crowder & Cash; Jaques & Co.*

(1) [1929] 1 Ch. 722. (2) [1929] 1 Ch. 726.

H. C. H.

CLAUSON J.
1929
July 26.

In re READE-REVELL.

CRELLIN *v.* MELLING.

[1929. R. 991.]

Infant—Maintenance—Settled Legacy—Contingent Life Interest—Direction to Accumulate and Capitalize Income until happening of Contingency—Trust not Carrying Intermediate Income of Property—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

A testatrix, who died after the commencement of the Trustee Act, 1925, by her will directed the trustees thereof to set apart a specific sum, to accumulate and capitalize the income thereof, until A. should attain the age of twenty-one years; and, if A. should attain that age, then to pay to her the income of that sum during her life and after her death to hold the capital sum in trust for her children:—

Held, that, as the trust for A., for a contingent interest for her life, did not carry the intermediate income, the trustees had, upon the proper construction of s. 31 of the Trustee Act, 1925, no power to apply that income towards A.'s maintenance.

ADJOURNED SUMMONS.

Florence E. Reade-Revell by her will, dated July 7, 1926, devised and bequeathed her residuary estate and effects to trustees upon trust for sale and conversion, and directed them to set apart and appropriate out of the moneys to arise therefrom 40,000*l.* and to invest the same and to pay the income arising therefrom to her husband during his life and from and after his decease and until Angele (in the will described as the testatrix's daughter) should attain the age of twenty-one years in case she should not then have attained that age to accumulate the annual income and add the same to the capital and from and after the attainment by Angele of that age to pay to her the annual income of that capital sum during her life and from and after Angele's decease to hold the same capital sum upon trust for Angele's children and issue as therein mentioned: should she die before attaining the age of twenty-one years or after attaining that age without leaving issue, then the trustees were to hold the capital sum in trust for three charitable objects therein mentioned. The testatrix further directed that the sum of 1000*l.* per annum should be paid out of the income of her estate for the education, maintenance and support of Angele until she should attain the age of twenty-one years. Subject to the said appropriation, the trustees were directed to hold the residue remaining upon trust for Angele absolutely to be paid and transferred to her on her attaining the age of twenty-one years, but should she die before attaining that age, the testatrix gave such residue to two of the aforesaid charities in equal shares.

The testatrix died on November 12, 1926, leaving her husband and Angele, who was her adopted daughter, surviving her; and on June 6, 1928, her husband died. The total value of the estate was about 59,000*l.*; so that, after an appropriation of 40,000*l.*, to answer the trust legacy, the ultimate residue would not be sufficient to provide the whole of the 1000*l.* per annum directed to be paid for Angele's maintenance.

The principal questions raised by the summons which was taken out by the trustees, were: whether the direction in the will to pay 1000*l.* per annum for the maintenance of Angele took priority over the 40,000*l.* trust legacy and whether, after the death of the testatrix's husband, the trustees had power to apply the income of that legacy for the maintenance of Angele until she should attain the age of twenty-one years.

Clauson J. having decided that, upon the true construction of the will, the 1000*l.* per annum directed to be paid for the maintenance of the infant was given out of the residue of the estate after providing for the 40,000*l.* trust legacy and was a continuing charge on the income thereof and did not take priority over the trust legacy, the second question, which is the only material one for this report, was then argued.

Jenkins K.C. and *Andrew Clark* for the plaintiffs.

Archer K.C. and *McMullan* for the infant Angele. Sect. 31 of the Trustee Act, 1925, empowers the trustees to apply the income of the 40,000*l.* legacy towards the infant's maintenance. The requirement of sub-s. 3 (1) is satisfied, since the trust of the legacy carries the intermediate income of the property within the meaning of the sub-section. The sub-section makes the enabling part of s. 31 inapplicable in a case where the income, pending the contingency, is given to a stranger, which is not the present case.

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(1) Sub-s. 3: "This section" (namely, s. 31) "applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property. . . . ."

[They referred to *In re Dickson* (1) and *In re Bowlby.* (2)]

A contingent bequest of property now carries the intermediate income: s. 175 of the Law of Property Act, 1925.

[CLAUSON J. referred to *In re Raine.* (3)]

Bennett K.C. and *L. W. Byrne* for the personal representatives of the deceased husband.

John W. F. Beaumont for one of the charities. The trustees have no power to apply the income of the 40,000*l.* legacy for the maintenance of the infant. The trust in her favour is subject to the prior trust to accumulate and capitalize the income during her minority. The power conferred by s. 31 is by sub-s. 3 made dependent upon the trust carrying the intermediate income. In face of the direction to accumulate the income and add it to capital, the trust for the infant for life cannot carry the intermediate income and, consequently, the enabling part of the section cannot apply to the income of this legacy during the minority of the infant legatee for life. Further, there is a contrary intention shown by the direction to accumulate and by the special provision for maintenance contained in the will: see s. 69, sub-s. 2, of Trustee Act, 1925. In *In re Thatcher's Trusts* (4) the infants took absolute interests on attaining twenty-one in the accumulations, the scheme of the will being to preserve the income for their benefit: see also *In re Cooper.* (5)

G. A. Rink for another charity similarly interested.

CLAUSON J. [after reading the material clauses of the will and stating the facts:] The question I have to decide is whether the trustees of this will have power to apply the income of the 40,000*l.* legacy towards the maintenance of the infant Angele until she attains the age of twenty-one. The contention of counsel on behalf of the infant is that

(1) (1885) 29 Ch. D. 331, 334.
(2) [1904] 2 Ch. 685.
(3) [1929] 1 Ch. 716.
(4) (1884) 26 Ch. D. 426.
(5) [1913] 1 Ch. 350.

s. 31 of the Trustee Act, 1925, confers that power on the trustees.

In the present case the legacy of 40,000*l.* is held in trust to pay the income to the infant for her life contingently upon her attaining the age of twenty-one years. By virtue of s. 31 the trustees may during the period of the infant's minority apply towards her maintenance the income of the property, provided the trust carries the intermediate income: see sub-s. 3 of s. 31. Here, there is in the will an express direction to the trustees to accumulate the income during the minority of the contingent life tenant and to add that income to the capital sum. The result of that direction must be that the contingent interest of the infant, being limited to an interest in the income of the fund as it stands when she attains twenty-one, does not carry the intermediate income of the property. It was contended that as the 40,000*l.* trust legacy carries interest as from a year after the death of the testatrix there is here a trust which carries the intermediate income within the meaning of the sub-section—namely, the trust of the legacy in favour of the infant and her children and the ultimate remaindermen in default of her children. But in my judgment upon the proper construction of the language of the sub-section, the trust therein referred to is, to apply that language to the present case, the trust which creates the contingent life interest in favour of the infant. That is a trust which does not carry the intermediate income on account of the direction for accumulation.

The authorities cited before me relate to corresponding statutory provisions under the older Acts and are not applicable to the present case, as the language used in s. 31 of the new Act differs from the language of the older provisions as to maintenance. Accordingly, there will be a declaration that the trustees have no power to apply the income of the 40,000*l.* trust legacy for the maintenance of the infant defendant.

Solicitors: *James Johnstone; Blount, Lynch, Petre & Colley; Shepheards, Walters & Bingley.*

H. C. H.

MAUGHAM J.

1929

June 11, 12.

In re BELCHAM AND GAWLEY'S CONTRACT.

[1928. B. 4830.]

Vendor and Purchaser—Particulars of Sale—Omission materially affecting Description—Compensation—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 13, 15, 19, 308.

At an auction sale the purchaser bought freehold property sold subject to certain special conditions and to the General Conditions of Sale, 1925. The particulars and conditions of sale did not disclose the fact that two sewers, vested in the local authority and known by the vendors to exist, ran along the east side of the premises and along the yard at the back. Objection was taken on behalf of the purchaser. The vendors refused to release him from the contract, contending that the existence of the sewers did not prevent the use of the premises as a dwelling-house, for which the purchaser had bought them; but abatement of the purchase price was offered by way of compensation. The purchaser declined the offer, and by this summons asked for a declaration that the property was substantially different from that agreed to be sold, and for rescission, or, alternatively, a declaration that he was entitled to compensation:—

Held, that the failure to disclose the existence of the sewers, although materially affecting the description, did not force upon the purchaser property substantially different from that agreed to be sold; and that the contract could be performed subject to compensation under Condition 35 of the General Conditions of Sale, 1925.

Shepherd v. *Croft* [1911] 1 Ch. 521 followed.

Flight v. *Booth* (1834) 1 Bing. (N. C.) 370 distinguished.

VENDOR AND PURCHASER SUMMONS.

At an auction sale held on September 8, 1928, the purchaser agreed to purchase certain freehold property, and on the same day paid a deposit on the purchase and signed an agreement to complete. The particulars and conditions of sale did not disclose the fact that two sewers, vested in the local sanitary authority, ran beneath the eastern side of the property. The abstract of title to the property showed that conveyances of it to two predecessors in title had been executed subject to the rights of the local authority in respect of drainage through sewers running along the eastern side. In reply to requisitions on behalf of the purchaser, the vendors' solicitors stated that they believed that there had never been a grant of any easement in respect of the sewers. They added that the sewers ran through the eastern side of the site of the property, and that the borough engineer would give information as to their exact position. The purchaser, on learning from his solicitors of the existence of the sewers, decided not to proceed with the purchase. Correspondence between the solicitors of the parties followed, and, in a letter of October 1, 1928, to the purchaser's solicitors, the vendors' solicitors stated that "the corporation sewer was known to the vendors; but it was not considered necessary to disclose it in the particulars of sale, inasmuch as it was perfectly apparent to any one who cared to inspect the premises, and if Mr. Gawley purchased without inspecting, he must not lay the blame upon the vendors. Apart from this, it is impossible to say that the property, by reason of the sewer, is not capable of being used for the purpose for which it was sold, namely, as a dwelling-house."

On November 13, 1928, the purchaser's solicitors wrote a letter repeating a demand that the contract be rescinded. The vendors, by a letter from their solicitors, refused to allow the purchaser to rescind, but offered, by way of compensation, to abate the purchase price by twenty pounds. The offer was declined: and this summons was taken out on behalf of the purchaser asking (inter alia): (1.) that, pursuant to s. 49 of the Law of Property Act, 1925, it might be declared that the existence under the property by the above mentioned contract agreed to be sold of two sewers vested in the local authority, and of the rights in relation to such sewers conferred upon the local authority by the Public Health Act, 1875, caused the property which the vendors were able to sell and convey to the purchaser to be substantially different from the property agreed to be sold; and (2.) that the contract be rescinded, and that the vendors be ordered to repay the deposit to the purchaser, or, alternatively, that it might be declared that the purchaser was entitled to compensation in respect of the sewers and of the local authority's rights in relation thereto. The purchaser admitted that he personally inspected the property before agreeing to buy it, but contended that he did not notice—and that, to the best of his belief, there was not upon the premises anything whatever of a nature to suggest—that there were under the property any sewers vested in the local authority, or any drains other than the usual drains necessary for service.

Sir Gerald Hurst K.C. and *Scott Thompson* for the purchaser. The point here is that the omission is of such consequence that it may reasonably be supposed that, but for it, the purchaser would not have bought: *In re Fawcett and Holmes' Contract.* (1)

[They referred also to *Simpson* v. *Gilley* (2) and *Yandle & Sons* v. *Sutton.* (3)]

H. F. F. Greenland for the vendors. This is a case of the kind intended to be covered by the General Conditions of Sale, 1925: *In re Brewer and Hankins's Contract.* (4) A local authority carrying a sewer into the garden of a private residence has to make compensation. As to knowledge of the existence of such a defect, see *Shepherd* v. *Croft.* (5) The only question in *Simpson* v. *Gilley* (2) was whether a vendor can force upon a purchaser a title with a condition that no error or omission which may be discovered before completion shall annul the sale. That case had nothing to do with the class of cases of which *Flight* v. *Booth* (6) is the example. If the vendor knows of the defect in the property, he is entitled to admit that he cannot force the defective property upon the purchaser, and to give compensation. If he does not know of it, he can force the property upon the purchaser, who must take it for better or worse. In the present case, the mere fact that the vendors knew or ought to have known before the sale that these sewers run under the land does not deprive them of their right to give compensation under Condition 35 of the General Conditions of Sale. (7) The premises were not sold for any particular purpose. There were merely certain facilities given for erecting a garage in a specified manner. In all cases of this kind it is essential to have regard to the description of the property. As to whether the property differs substantially from that agreed to be sold, it is significant that it is admitted that the existence of the sewers does not alter the property.

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(1) (1889) 42 Ch. D. 150, 155, 158.

(2) (1922) 92 L. J. (Ch.) 194.

(3) [1922] 2 Ch. 199.

(4) (1899) 80 L. T. 127.

(5) [1911] 1 Ch. 521.

(6) 1 Bing. (N. C.) 370.

(7) 35.—(1.) "Measurements and quantities, if substantially correct, shall not be the subject of compensation, nor shall any compensation be payable in respect of any mistake in a sale plan, furnished for the purposes of identity, but nothing in this sub-section shall prevent compensation being paid or allowed under the next sub-section where an incorrect

Sir Gerald Hurst K.C. in reply. The failure of the vendors to fulfil their obligation under the second paragraph of Condition 19 makes it inequitable for them to rely on Condition 35. (1)

Maugham J. [having stated the facts :] There can be no question as to the result of the fact that these two sewers run through the property. They are clearly vested, under

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statement, error, or omission, as to measurements, quantities, or otherwise, materially affects the description of the property."

(2.) "Subject as aforesaid, any error, omission, or misstatement in the contract, which may be discovered before completion, though materially affecting the description of the property, shall not annul the sale, or entitle a purchaser to be discharged from his purchase, but if pointed out before completion and not otherwise, compensation shall be made to or by a purchaser, as the case may require."

(3.) "The amount of such compensation, if the parties do not agree, shall, unless the contract otherwise provides, be settled by arbitration by a sole arbitrator agreed by the parties, but if the parties do not agree by a sole arbitrator nominated by the President or other principal officer for the time being, of the local law society, or, where there is no local law society in the district wherein the land is situated, by the President for the time being of the Law Society, and the Arbitration Act, 1889, shall apply accordingly."

(4.) "Nothing in these conditions shall—

(*a*) enable the vendor or the purchaser to compel the purchaser or the vendor with or without compensation, to accept or convey property which differs substantially, whether in quantity, quality, tenure, or otherwise, from the property agreed to be purchased or sold ;

(*b*) affect the right of the purchaser to rescind or repudiate the contract where compensation for a claim attributable to a material error, omission, or misstatement cannot be assessed."

(1) (Condition 19 (2.)): "Provided that nothing in this condition shall discharge the vendor from the obligation to disclose, on or before the date of the sale, the existence of all latent easements, rights, privileges, or other liabilities which are known by him to affect the property."

s. 13 of the Public Health Act, 1875, in the local authority. (1) The local authority is also, under s. 15, under an obligation to keep them in repair. (2) Sect. 19 imposes a further obligation (3); and s. 308 provides for compensation. (4)

The question is whether the omission in the contract is one which comes within Condition 35 (2.) of the General Conditions of Sale, 1925, with the result that it does not annul the sale but enables the purchaser to obtain compensation, or whether it comes within Condition 35 (4.). It has been suggested that the quantum of compensation cannot be assessed, with the result that Condition 35 (4.) (*b*) applies. But I am bound to follow the decision in *In re Brewer and Hankins's Contract* (5), where all the judges took the view that the existence of the sewer was a matter for compensation, and decided that compensation could be assessed.

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(1) Sect. 13: "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto,

Except

(1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders; and

(2.) Sewers made and used for the purpose of draining preserving or improving land under any local or private Act of Parliament, or for the purpose of irrigating land; and

(3.) Sewers under the authority of any commissioners of sewers appointed by the Crown;

Shall vest in and be under the control of such local authority.

"Provided that sewers within the district of a local authority which have been or which may hereafter be constructed by or transferred to some other local authority or by or to a sewage board or other authority empowered under any Act of Parliament to construct sewers shall (subject to any agreement to the contrary) vest in and be under the control of the authority who constructed the same or to whom the same have been transferred."

(2) Sect. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

(3) Sect. 19: "Every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

(4) Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may at the option of either party be ascertained by and recovered before a court of summary jurisdiction."

(5) 80 L. T. 127.

The questions which I have to determine involve, I think, much difficulty, having regard to the decisions which bind me in dealing with a case such as the present. There is general agreement with the statement of the law on the subject in *Flight* v. *Booth* (1), in which Tindal C.J. decided that in relation to contracts for the sale of land in which there are misstatements or omissions which were not wilful and are therefore clear of fraud, there is a safe rule to be followed—namely: "that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

That statement has been constantly approved and followed: and it clearly is not limited in terms to cases where the omission or misstatement results from the inadvertence of the vendors, or from an error in the production of the particulars, or from failure to recollect a known fact. In my opinion, it cannot be said, in the present case, that the omission is such that it may reasonably be supposed that, but for it, the purchaser might never have contracted. I have come to the conclusion that on that point—apart from the fact that the vendors were aware of the existence of the sewers, a circumstance which might form a ground of distinction—I am bound by the decision of the Court of Appeal in *In re Brewer and Hankins's Contract.* (2) It is material to consider the conditions of sale, and to bear in mind that the ground was not sold for building purposes, and that the locus in quo, as shown on a plan, indicates that these premises were not very good or suitable for any considerable building developments, and that

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(1) 1 Bing. (N. C.) 370, 377.

(2) 80 L. T. 127.

MAUGHAM J.

1929

BELCHAM AND GAWLEY'S CONTRACT, *In re.*

the only alterations suggested in the particulars can be carried out in spite of the sewers. In *In re Brewer and Hankins's Contract* (1) the purchaser discovered that there was a public sewer passing under the garden at the rear of the house. Its existence in the garden was of course inconvenient, and it would have been troublesome if the erection of certain buildings in the garden, which was contemplated, had been carried out. Stirling J. pointed out that the vendor was not aware of the true state of affairs: also, he held that there had been no fraud. I pause here to say that there is nothing to suggest fraud in the present case, and I think that the vendors acted honestly in the matter. Stirling J. held that the case before him was a case for compensation, and, accordingly, that the doctrine laid down in *Flight* v. *Booth* (2) did not apply. The case came before the Court of Appeal, and the judges of that Court entirely agreed with Stirling J.

It seems to me that the other cases to which I have been referred can be explained or distinguished. In *In re Fawcett and Holmes' Contract* (3) there was a considerable misdirection as to the area of the property, and the Court of Appeal held that it did not go to the essence of the contract or materially alter the substance of it. That decision is therefore in favour of the view which I am here adopting. In *In re Puckett and Smith's Contract* (4) the land was bought for building purposes. There was in fact a representation that it was suitable for building, and that there was no restriction as to the class of house. Nothing was said about the underground culvert, and there was nothing on the plan to indicate it. It plainly militated against the use of the site for building purposes: and accordingly the principle laid down in *Flight* v. *Booth* (2) applied. I may add that the case was one in which property was sold subject to "rights of way mentioned in the particulars or to affect the same" and there was a provision that "if any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." Stirling L.J.

(1) 80 L. T. 127.
(2) 1 Bing. (N. C.) 370.
(3) 42 Ch. D. 150.
(4) [1902] 2 Ch. 258.

referred to *In re Brewer and Hankins's Contract* (1), and distinguished it on the facts, saying that it was quite clear that in the case before him the property was not offered for building purposes.

Pemsel and Wilson v. *Tucker* (2) was a somewhat similar case dealing with an open contract whereby the plaintiff agreed to buy two houses. Under part of the property agreed to be sold ran a drain, and there was a sewer vested in a local authority. The learned judge held that there was a defect in the title, that the vendor had not made a good contract, and, accordingly, that the local authority had rights in some part of that which he had agreed to sell, and had also rights which might seriously interfere with the purchaser's enjoyment. The sewer in question passed actually under the house, and there was beneath the flagstone a manhole giving access to the drain. The decision does not assist the Court in construing Condition 35 in the present case.

Prima facie, therefore, and apart from the knowledge of the vendor, I should be of opinion that the present is a case in which he is not seeking to compel the purchaser to accept property which differs substantially from that agreed to be sold, and that the omission to state that sewers existed is an error for which compensation can be made. But it is insisted as a point of serious importance that the vendors admittedly were aware of the existence of the sewers: and the purchaser relies upon a dictum of Astbury J. in *Simpson* v. *Gilley.* (3) That was a very complicated case, concerning a sale of property in lots subject to a condition that if any errors or omissions should be discovered, no compensation should be paid. The purchaser of lot 2 was unaware that a right of way—described in the particulars in terms under which the purchasers would assume that it would be a private right for purchasers of lot 2—was intended to be enjoyed by the purchasers of lot 3. By an error the vendor failed properly to describe the right of way, and the learned judge holding that the vendor was aware of all rights intended

(1) 80 L. T. 127.

(2) [1907] 2 Ch. 191.

(3) 92 L. J. (Ch.) 194, 201.

to be enjoyed by purchasers of lot 3, said: "I think that"—i.e., the condition that error, misstatement, or omission in the particulars, shall not annul the sale—"must be limited in common fairness to omissions and errors which the vendor is not aware of at the time when the particulars are framed." In that case the conditions were in very different form from those in the present case, and wholly excluded compensation.

On that statement, it is contended on behalf of the purchasers in the present case that, as the vendors were aware of the existence of the sewers, Condition 35 (2.) is excluded. I must point out that Condition 35 does not in terms suggest any such qualification.

In the present case I am not dealing merely with an easement: I am dealing with a defective title, since the sewers themselves are vested in the local authority. There is an omission to state the nature of the defect, and that omission is one which materially affects the description of the property within the meaning of the condition.

On the whole, I have come to the conclusion that, notwithstanding the knowledge of the vendors, the case, on the true construction of the present conditions, is one for compensation. I derive much support from the decision of Parker J. in *Shepherd* v. *Croft.* (1) In that case the contract stated that the property was sold "subject to all drainage, sewer, and other easements affecting the same": and there was a clause providing that "if any error or misstatement in the particulars or contract should be disclosed, the same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party": and it so happened that there was running through the property a natural underground watercourse in a culvert constructed by the owners of adjoining lands. It was also held that the purchaser, as in the present case, bought the property primarily as a residence: but he had contemplated using the site for building. The vendors, who had known of the defect, brought an action for specific performance, but they wisely waived the

(1) [1911] 1 Ch. 521.

condition as to compensation. It was held that the watercourse was a latent defect, and it was further held—as I feel bound to hold in the present case—that the defect was not within the principle stated in *Flight* v. *Booth.* (1) The learned judge then had to deal with the question of knowledge, and he said (2): "If I were to hold that the knowledge of a defect of this kind, not within *Flight* v. *Booth*, was a fatal objection to specific performance and implied a right in the purchaser to rescind, I should in effect be treating it as equivalent to a misrepresentation of fact where the vendor knew that what was being stated was untrue; and it would follow that no compensation could be given in a Court of Equity for any defect, however trifling, if at the time of the sale the vendor was aware of the defect. I do not think that is the law," and he held that the knowledge of the vendor, in the circumstances, was immaterial.

I think that that statement of the law is correct and that I ought to follow it.

I hold, therefore, that the contract in the present case is one which can be performed subject to compensation under Condition 35 (2.). The existence of the two sewers does not cause the property to be substantially different from that agreed to be sold within the meaning of Condition 35 (4.) and, accordingly, the purchaser is not entitled to rescission; but he is entitled to compensation.

Solicitors: *Bentleys, for Verney, Cooper & Co., Southend; Kingsford, Dorman & Co., for Gregsons & Saul, Southend.*

(1) 1 Bing. (N. C.) 370.

(2) [1911] 1 Ch. 521, 531.

K. R. A. H.

MAUGHAM J.

1929

June 13, 14.

In re HOW.

HOW *v.* HOW.

[1927. H. 2567.]

Charity—Bequest "to distribute between 'good works'"—Evidence as to sense in which Testator used Phrase "good works"—Admissibility.

In construing gifts of recent date, evidence is not admissible to show that words having a clear ordinary meaning were used in a special narrower sense.

The testator, a member of the "Brethren," or "Plymouth Brethren," by his will left all his property, subject to a life interest, to his widow, to be divided into two equal parts, one for his sons, and the other for his trustees "to distribute between the various good works which I and my wife have been in the habit of assisting. . . . ." After the widow's death this summons was taken out to determine whether that direction created a good charitable trust. Affidavits were tendered to the effect that among the "Brethren" "good works" was a phrase in common use to indicate works distinctly religious—i.e., Christian—and suggesting that the testator had used it in that sense:—

Held, that there was no evidence of the significance with which the testator had used the words, and that the statement as to their use among the "Brethren" was not evidence of constant use in such a sense as would exclude non-religious charitable objects.

Shore v. *Wilson* (1842) 9 Cl. & F. 355; *In re Kenny* (1907) 97 L. T. 130; and *In re Rees* [1920] 2 Ch. 59 distinguished.

ADJOURNED SUMMONS.

By his will dated June 23, 1917, Sidney Radcliffe How (hereinafter called "the testator") gave and bequeathed "unto my wife Mary Elizabeth How the whole of my property for her sole use during her life, and at her death the portion remaining to be divided as to one-half between my two sons Francis Radcliffe How and Allan Sidney How on their attaining the age of thirty years, and the other half I ask my trustees to distribute between the various good works which my wife and I have been in the habit of assisting in such sums as they the trustees may consider best." The testator and his wife were members of the body of Evangelical Christians known as "Brethren," or "Plymouth Brethren."

The testator died on May 15, 1919, and his will was proved on July 22, 1919. His widow, Mary Elizabeth How, died on April 12, 1927, and this summons, issued shortly afterwards, was taken out to determine whether the above direction in the will constituted a good and valid charitable trust or whether there was an intestacy in regard thereto. The summons also asked that, if and so far as necessary, an inquiry might be directed as to the "good works," as construed by the Court, which the testator and his wife had been in the habit of assisting. As it became necessary to file further evidence to assist the Court to decide the meaning of the words used, the Attorney-General was, by the direction of the Master, added as a party to the summons. The testator's solicitor and the testator's brother, both of whom were members of the "Brethren," swore affidavits to the effect that among the "Brethren" "good works" was a phrase in common use to indicate works distinctly religious —i.e., Christian—as against works of a merely philanthropic, benevolent or other character, and that the testator used the phrase in reference to religious charitable works only. The solicitor ascertained that the testator and his wife had been in the habit of assisting some fifteen charitable objects, among which were Mr. Turner's Home for Fatherless Girls, the Mission to Lepers, the Royal Sailors' Rests and Miss Pearks' Soldiers' Homes.

J. F. W. Galbraith K.C. and *W. G. H. Cook* for the trustees. *In re Rees* (1) was a case dealing with the ambiguous phrase "missionary purposes." The present is a proper case for the Court, taking all the evidence into consideration, to say that in the direction contained in the will the phrase "good works" is used in the sense sworn to in the affidavit of the testator's solicitor. It has the meaning which, when used by a good man of this character, the Court would come to the conclusion that it would have. The evidence is admissible, and it shows that the testator was an earnest worker, and that the phrase "good works" is in common use among the "Brethren" as indicating works specifically religious: *In re Kenny* (2); *Shore* v. *Wilson*. (3)

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(1) [1920] 2 Ch. 59.
(2) 97 L. T. 130.
(3) 9 Cl. & F. 355.

H. B. Vaisey K.C. and *L. B. Tillard* for the testator's sons. There is no evidence that the testator here used the phrase "good works" in the narrow sense which has been attributed to it. The phrase is ambiguous, and extraneous evidence must be let in to show what is and what is not "charitable." Such cases as *In re Huxtable* (1) are quite distinguishable. In *In re Kenny* (2) Warrington J. (as he then was) based his finding on the fact that the testatrix was well aware of the charitable objects which the donee carried on. In *In re Rees* (3) there was no power to select, but it was shown that the testatrix was well aware of the donee's activities. In *Shore* v. *Wilson* (4) the issue was properly stated by Coleridge J. In the present case the words "good works" have a clear and unambiguous meaning.

Stafford Crossman for the Attorney-General. Only when the identity of the testator is known can it be said that the words were used in any technical sense. The Court can give no meaning to the phrase "good works" without the assistance of some evidence.

[He referred to *In re Good* (5); *In re Donald.* (6)]

MAUGHAM J. [having stated the facts:] It is necessary to decide whether I can, within the recognized principles applying to such a case, admit this evidence so as to justify me in putting upon the phrase "good works" the limited meaning that the works are to be religious. The result of so doing would be to hold that the testator did not use the phrase in the ordinary sense which I attribute to it, which certainly includes ordinary charitable purposes. Under the limited meaning, several of the objects described in the evidence as objects which the testator and his wife were in the habit of assisting would be excluded—e.g., the Home for Fatherless Girls, the Mission to Lepers, the Royal Sailors' Rests and Miss Pearks' Soldiers' Homes. It has been argued that the well known decision of *Shore* v. *Wilson* (4), and the opinions of the judges as there given, ought to lead me to admit the evidence. But it is to be observed that the members of the House of Lords who formed the Court decided the case solely on the ground that the evidence before them —which they confined to evidence as to the meaning of phrases used many years before in and by a particular society of which the donor was a member—was in effect no more than evidence "of the circumstances by which the author of the instrument was surrounded at the time." That case raised the question of the construction, about the year 1834, of deeds executed in 1704; and all the judges came to the conclusion that even when language to be construed appears to have a clear and unambiguous meaning, yet if it was used at a remote date, the Court is bound to inquire what was the meaning of the words at the date when they were used, and may not take it for granted that they have the same meaning when they are being construed as they had when they were used. I note that the judges were of opinion that the phrase "pure and godly preachers" would, if used at the date when the case was before them, have been free from ambiguity; and I gather also that the majority came to the conclusion that, had the deed been executed in 1830 instead of 1704, their decision would have been the other way. The opinions of the judges are clearly in favour of rejecting the evidence tendered by the trustees.

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(1) [1902] 2 Ch. 793.
(2) 97 L. T. 130.
(3) [1920] 2 Ch. 59.
(4) 9 Cl. & F. 355, 526.
(5) [1905] 2 Ch. 60.
(6) [1909] 2 Ch. 410.

I think that *In re Kenny* (1) and *In re Rees* (2) are distinguishable from the present case. In the first, a decision of Warrington J. (as he then was), the testatrix directed her trustees to pay trust moneys to her friends to be applied to "missionary objects." It was argued that the words "missionary objects" were too vague, and Warrington J. added that he was entitled to consider "who Dr. Maclean"—named in the will—"was, and that he was engaged for many years in the work of Christian missions, and that he was known to the testatrix." He therefore concluded that the phrase was used in its ordinary sense, and that the gift created a good and valid charitable trust. That seems to be a case in which the Court was being informed that the

(1) 97 L. T. 130.

(2) [1920] 2 Ch. 59.

person who was to administer the fund was engaged in missions and was known to the testatrix.

In the second of these two cases, which was a decision of Sargant J. (as he then was), the property in question was bequeathed to one George Jeffrys for missionary purposes, and the evidence admitted was as to the donee's identity, the work carried on by him from a preceding date, that he had often met the testatrix and discussed religious subjects with her, and that she from time to time sent him sums of money to help him in his work; and it was held that that was evidence of surrounding circumstances tending to show that he was to have the carrying on of the work after her death in the same way as before. The evidence was thus admitted to show that the testator used the words "missionary purposes" in the popular sense of Christian missionary work.

In the present case I have no evidence of the significance with which the testator was accustomed to use the phrase "good works." All that I have is a statement that the phrase is known to be in use among the "Brethren" in application to works distinctly religious. I do not regard that as establishing that it is always used in such a sense as to exclude a charitable object such as a hospital. I am satisfied that in general such objects would be included, and I am unable to admit the evidence as cutting down the natural meaning of the words. The remaining questions on the summons must be determined on that footing.

Solicitors: *Stunt & Son; Boyce, Evans & Sheppard; Treasury Solicitor.*

K. R. A. H.

In re FULFORD.

FULFORD *v.* HYSLOP.

[1929. F. 351.]

MAUGHAM J.

1929
June 21, 25.

Will—Construction—Share settled on Daughter for Life on her attaining Twenty-one—Income Tax paid on Accumulations during her Minority—Repayment of Income Tax—Daughter entitled absolutely to Amount repaid —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 25.

A testator directed that his residuary estate should be held in trust for such of his sons as should attain the age of twenty-one years and such of his daughters as should attain that age or marry. He further directed his trustees to hold the share of a daughter in trust to pay her the income thereof during her life, and after her death in trust for such persons as she should by will appoint, and in default of appointment in trust for all her children in equal shares, and in default of any issue of a daughter in trust for his other sons or daughters as part of their shares. The testator died in 1906, leaving one son and one daughter. The daughter attained the age of twenty-one years in 1926, and married in 1927. There was issue of that marriage one son. In 1927 the daughter claimed, under s. 25 of the Income Tax Act, 1918, repayment of moneys paid or deducted on account of tax in respect of the income of her share accumulated under the will during her minority. In 1928 the Board of Inland Revenue admitted her claim in this respect to the amount of 7770*l.* 19*s.* 4*d.*, and that amount had been paid to her. A question was then raised whether that sum should be treated as an accretion to the capital of the daughter's share, or whether she was entitled to it absolutely:—

Held, that the daughter was entitled absolutely to the sum of 7770*l.* 19*s.* 4*d.*

By his will dated December 9, 1905, the testator directed that, subject to a certain provision for his widow, his residuary estate should be held upon trust in equal shares for such of his children as, being sons or a son, should attain the age of twenty-one years, or, being daughters or a daughter, should attain that age or marry. The share of a son was to be accumulated until he attained the age of twenty-five, and as to the share of a daughter he directed that his trustees should retain the same upon trust to pay the income to the daughter during her life for her separate use without power of anticipation, and that after her death they should hold her share and the income thereof in trust for such persons and in such manner in all respects as she should by will appoint, and in default of and subject to any such appointment in trust for all her children who being male should attain the age of twenty-one years, or being female should attain that age or marry, in equal shares, and in default of any issue of a daughter in trust for his other sons or daughters as part of their shares.

The testator died on August 26, 1906, leaving a son, the defendant, R. T. Fulford, who was born on April 26, 1902, and a daughter, the defendant, B. E. Hyslop, born on October 5, 1905. B. E. Hyslop attained twenty-one on October 5, 1926, and married on September 30, 1927. There was issue of that marriage, one son, the infant defendant, W. F. Hyslop.

In September, 1927, claims were made by the defendant, B. E. Hyslop, under s. 25 of the Income Tax Act, 1918, for repayment of moneys paid or deducted on account of tax in respect of the income of her share accumulated under the will during her minority. In October, 1928, the Board of Inland Revenue admitted her claim in this respect to the amount of 7770*l.* 19*s.* 4*d.*, and that amount had since been paid to her.

Under these circumstances the trustees of the will took out this summons asking whether upon the true construction of the will any and what part of the sum of 7770*l.* 19*s.* 4*d.* ought to be paid to or retained by the plaintiffs as trustees, and treated as an accretion to capital of the share of B. E. Hyslop, or whether that sum or any part thereof belonged to her absolutely.

J. B. Lindon for the plaintiffs. The only cases analogous to the present one are the cases where the tenant for life received compensation from the Government for damage done to the trust property during the war: *In re Williams' Settlement* (1), a case in favour of the tenant for life.

Cyril King for the defendant, B. E. Hyslop. The decisions in *Dale* v. *Mitcalfe* (2) are entirely in favour of the tenant

(1) [1922] 2 Ch. 750. (2) [1927] 2 K. B. 491; [1928] 1 K. B. 383.

for life. Sect. 25 of the Income Tax Act, 1918, treats a fund accumulated for the benefit of any person contingently on his attaining a specified age as his or hers. The status of the tenant for life is to be imported into the section. Sects. 17 to 22 of the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), are incorporated in s. 25. Sect. 25 has acted as a repeal of s. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). There can be no reason for taking away the personal rights of the tenant for life under s. 25. Mrs. Hyslop is entitled absolutely to the amount recovered.

[He also cited *In re Pettit.* (1)]

A. C. Edgar for the defendants, W. F. Hyslop and R. T. Fulford. The equities in this case favour the remaindermen. The excessive tax paid was part of the income of the fund, and not part of the income used for the support of Mrs. Hyslop. The word used in s. 25 is "repaid," and when the excess tax came back it should have been treated as if it had never gone. Sect. 25 merely indicates the relations between the income tax authorities and the claimant; it does not regulate the relations between other parties. *Dale* v. *Mitcalfe* (2) and *In re Williams' Settlement* (3) were cases under the Settled Land Acts, and where the tenant for life was entitled to commit waste. *In re Foster's Settled Estates* (4) shows that even under the Settled Land Acts the tenant for life is not entitled to any casual profit. The amount repaid should be handed over to the trustees.

MAUGHAM J. A curious question arises in this case in reference to a sum of 7770*l.* 19*s.* 4*d.* which has been received from the Commissioners of Inland Revenue as and by way of a repayment under s. 25 of the Income Tax Act of 1918 on account of tax which was paid in respect of the share of the defendant, Betty Easton Hyslop, in the residuary estate of the testator. [His Lordship stated the facts, and continued:] In effect, therefore, half of the estate of the

(1) [1922] 2 Ch. 765.

(2) [1927] 2 K. B. 491; [1928] 1 K. B. 383.

(3) [1922] 2 Ch. 750.

(4) [1922] 1 Ch. 348.

testator was to be held at the death of the testator, subject to the provision for the widow, upon trust to accumulate for the benefit of the daughter, Betty Easton Hyslop.

It is indisputable that the accumulations were not accumulations which would be payable to Mrs. Hyslop on attaining twenty-one or marriage, and that they would be added to capital. That was decided in *In re Bowlby* (1), the principle of which applies to the present will.

Sect. 25 of the Income Tax Act, 1918, is a section of a somewhat curious character. It provides that "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled, on proof of the claim in manner prescribed by this Act, to have repaid to him on account of the tax which has been paid in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year." On that several things are apparent. In the first place the section applies only to an accumulation for the benefit of a person contingently on his attaining some specified age or marrying. In this case the contingency was Mrs. Hyslop attaining twenty-one or marrying under that age. Then one has to consider the aggregate amount in any year of assessment of that income and of the income from any other fund subject to the like trusts for accumulation and the total income of that person (in this case Mrs. Hyslop) from all sources; and if the aggregate of all those sums is such as would entitle Mrs. Hyslop to relief, Mrs. Hyslop, and she only, is entitled, on making a claim after the contingency happens—in this case, after her attaining twenty-one—to have repaid to her the sum which is specified in the section. That the section applies to such a case as Mrs. Hyslop's has been decided by the Court of Appeal in the recent case of *Dale* v. *Mitcalfe* (1), affirming a decision of Rowlatt J. (2) That was a case where the person making the claim to repayment under s. 25 was a person who was not entitled to the accumulations on the contingency happening—namely, upon attaining twenty-one. Nevertheless, the Court of Appeal had no difficulty in finding that the income was being accumulated "for the benefit" of the person there in question, Mrs. Mitcalfe, and that the section applied. It is, I think, indisputable that the position of a claimant under s. 25 is such that his or her position under the Income Tax Acts is imported into the section for the purpose of ascertaining the amount of the relief. In other words, such relief is dependent on what may be perhaps described as the income tax status of the claimant, and that is a necessary factor in determining the quantum repayable. It is, therefore, beyond all question a right of a personal character, and the words of the section themselves point clearly to that being the position, because, when the conditions are relatively mentioned, the section proceeds to say: "That person shall, on making a claim . . . ., be entitled, ... to have repaid to him on account of the tax which has been paid . . . . a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources . . . . had been equal to the aggregate yearly income for that year;"

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(1) [1904] 2 Ch. 685.

The result, therefore, is that Mrs. Hyslop is the person who has a personal right under s. 25, and that the sum of 7770*l.* 19*s.* 4*d.* has in fact been repaid on her claim and, in the event, to her, and the question which I have to determine is whether, in those circumstances, the sum so paid ought to be handed over to the plaintiffs, as trustees of the will, and treated as an accretion to capital of the share of Mrs. Hyslop, or whether Mrs. Hyslop is entitled to retain the sum and apply it as she may think fit. Now in *Dale* v. *Mitcalfe* (1) the point was not, it is true, decided. It was held that the right was a personal right to make a claim within the time limit. Sargant L.J. (2) said this: "Of course there is in this case this to be considered, that the result may be, and I think probably is, that the income tax which is recovered will be paid to the daughter herself, and will not be caught by the settlement." That was a case of a settlement by deed, and not of a will. "She will probably take that absolutely. It is possible—I do not want to decide the point, which may be one to be decided hereafter in the Chancery Division—that the sum so paid to her is itself caught by the settlement and goes with accumulations which have been so much less by reason of the deductions. But assuming that it is not so, and that the daughter gets this sum of 380*l.* or so absolutely, I do not see that there is any difficulty or inconsistency in this. At any rate it is so minor an inconsistency or anomaly as ought not to prevent the Court putting the construction on the words which I have indicated."

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(1) [1928] 1 K. B. 383.

(2) [1927] 2 K. B. 491.

Now in my view, the sum repayable, as the section says, to Mrs. Hyslop under s. 25 of the Act is a sum which prima facie she is entitled to retain for herself, unless there is some equity under which the trustees, as representing people who may possibly claim under the settlement of the daughter's share, can validly and properly make a claim to it. It may be observed in this case that Mrs. Hyslop has a general power to appoint by will to any person, but I do not think that the decision in this case turns upon that point. I think the only way in which a right to retain this sum can be got is by establishing an equity in favour of those entitled in remainder. I am unable to see that any such equity exists in this case. I think this sum when repaid, has ceased to bear the quality

(1) [1928] 1 K. B. 383.

(2) [1928] 1 K. B. 383, 395.

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of income. It is true that the Master of the Rolls, in *Dale* v. *Mitcalfe* (1), referred on two occasions to the repayment as if it were a repayment of a sum which ought not to have been deducted from the income, and if that were the accurate and strict view of the case, I conceive it is possible that there might be a claim on behalf of those entitled in remainder; but I think it is clear that the Master of the Rolls only uses that phrase to express the result which is ascertained after the contingency has happened, and the claimant in question has either attained twenty-one, or other specified age, or married. In the meantime it is not literally correct to say that the income tax ought not to have been paid. The income tax had to be paid, because, until the contingency happened, it was impossible to tell that it ever would happen. Accordingly, it is a case in which the Legislature has thought fit to direct a repayment on the conditions I have mentioned. If, as the result of subsequent events, it becomes known that the fund has accumulated for the benefit of a person, and that the contingency has happened, or that the right is no longer one which is hypothetical, in my opinion it is then a case where the Legislature has provided for a personal repayment on personal grounds to somebody who, in this particular case and in the case of *Dale* v. *Mitcalfe* (2), is getting a windfall from the Commissioners of Inland Revenue. There is no general equity applicable to the case.

There are many instances in which tenants for life get sums which to some extent resemble such a sum as is here in question. The case of *In re Williams' Settlement* (3), and the various cases there referred to are examples, and other illustrations can be given. Suffice it to state that so far as I know there is no equitable principle on which trustees, on behalf of persons entitled in remainder, are entitled to make a claim.

Accordingly, I shall declare that upon the true construction of the will, and in the events which have happened, the sum of 7770*l.* 19*s.* 4*d.* belongs to the defendant, Betty Easton

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(1) [1928] 1 K. B. 383, 390, 391.

(2) [1927] 2 K. B. 491; [1928] 1 K. B. 383.

(3) [1922] 2 Ch. 750.

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Hyslop, absolutely, and the costs of the application must be paid as between solicitor and client out of the capital of her share.

Solicitors for all parties: *Ward, Bowie & Co., for Booth & Co., Leeds.*

P. J. B.

MAUGHAM J.
1929
July 3.

In re THE SERVICES CLUB ESTATE SYNDICATE, LIMITED.

McCANDLISH *v.* THE COMPANY.

[1928. S. 3997.]

Company—Debenture Holder's Action—"One Man" Company—Managing Director as Plaintiff—Transactions of Plaintiff with Company not investigated—Interest of Plaintiff adverse to that of remaining Debenture Holders—Transfer of Action to independent Party.

The conduct of a debenture holder's action begun by a person whose transactions with the company the Court considers to require investigation, or whose interests are shown to be adverse to those of the remaining debenture holders, may be given by the Court to an independent party.

One of the objects of the company was to buy and let premises for use as flats and clubs. Its first directors were the plaintiff and his nominee, but it was in substance a "one man" company with the plaintiff as managing director. It granted leases of certain premises to the S. syndicate, of which the directors were the plaintiff and the same nominee. The company agreed to pay a yearly salary to the plaintiff, and guaranteed the issue of debentures by the syndicate. The syndicate soon failed to pay rent, but the plaintiff took no steps either to enforce payment or forfeit the leases: and, although the company was carrying on business at a loss, he bought a quantity of furniture with its money on its behalf. The syndicate issued debentures, the plaintiff becoming the holder of a number of them, and also holding debentures issued by the company. Later, a receiver and manager of the property of the syndicate charged by the debentures was appointed, and the plaintiff began a debenture holder's action against the company, subsequently selling the furniture which he had bought and the leasehold premises at a loss. Ultimately, he resigned his directorship: and this summons asked that the conduct of the proceedings should be vested in the applicant—another debenture holder—on the ground that the plaintiff, against whom gross negligence was alleged, had an interest adverse to that of the remaining debenture holders:—

Held, that, as the transactions of the plaintiff with the company had never been investigated, and as it had so far been impossible to investigate them, it was desirable that the conduct of the action should be given to an independent person.

ADJOURNED SUMMONS.

The Services Club Estate Syndicate, Ld. (hereinafter called "the company"), was incorporated on January 17, 1917, with a capital of 250*l.* divided into 5000 shares of one shilling each, all of them save two being issued to John Alexander McCandlish (hereinafter called "the plaintiff"). The first directors of the company were the plaintiff, and Frederick Laurence Lee, a nominee of the plaintiff. During a certain period, Henry George Fuller Archer, a defendant to this summons, was a director: but in substance the company was a "one man" company with the plaintiff as managing director. Among the objects of the company was the purchasing and letting on lease of premises for use as flats and clubs: and in 1917, it owned leasehold premises known as 17, 18, and 19 Stratford Place, London. The company granted leases of these premises to the Stratford Syndicate, Ld. (hereinafter called "the syndicate"). The syndicate was incorporated on February 15, 1916, with a capital of 2000*l.* divided into 40,000 shares of one shilling each. The directors were the plaintiff, to whom about 36,000 of the shares were allotted, and Lee; and the syndicate took the leases from the company for the purpose of carrying on the business of running a club. The company entered into two agreements, under one of which the plaintiff was to receive a salary of 2000*l.* a year: under the other, the company guaranteed an issue by the syndicate of debentures to the amount of 25,000*l.* In or about October, 1919, the syndicate—having previously issued debentures which had been satisfied in December of that year—issued further debentures to secure principal sums charged on its undertaking, all its assets and property present and future, including uncalled capital, the twenty-one years' lease of 19 Stratford Place, the furniture and effects in 18 and 19 Stratford Place and the goodwill of the Services Club. Under the term of its agreement for the tenancy of the premises in Stratford Place, the syndicate did pay some rent to the company. But by the end of 1917, a sum of more than 2000*l.* was owing in respect of rent: and for the year 1923 there was a deficit of assets amounting to 14,986*l.*, as well as arrears of rent amounting to over 12,000*l.* The plaintiff and Lee—who were the directors at the time—took no steps to enforce payment of the arrears, to forfeit the leases, or to determine the tenancy: and in 1919, despite the fact that rent was then owing from the syndicate to the company, which was at that time carrying on business at a loss, the plaintiff bought, on behalf of and with money belonging to the company, a considerable quantity of furniture to the value of about 14,881*l.* This the syndicate used—without ever paying the company anything for the user—for the purposes of a club known as the "Ladies' Athenæum Club."

In January, 1922, the company issued a series of mortgage debentures in denominations of 50*l.* and 100*l.* each, to secure principal sums amounting in the aggregate to 20,000*l.* secured by a floating charge on the undertaking of the company and all its property and assets present and future including uncalled share and loan capital, subject to all existing charges and debentures amounting to 48,900*l.* In January, 1924, the company created a series of second mortgage debentures, and issued debentures of that series to the amount of 10,000*l.*, subject to prior mortgages and charges amounting to 57,510*l.*: and in July of that year, it issued further debentures of the same series to the amount of 10,000*l.*, subject to existing charges amounting to 63,410*l.*

At the beginning of October, 1927, the plaintiff held a number of the debentures issued by the syndicate, and about that time began a debenture holder's action against it. On October 5, a receiver and manager was appointed of the property of the syndicate charged by the debentures; soon afterwards the plaintiff sold, at a loss of 12,381*l.*, the whole of the furniture which he had bought in 1919 on behalf of the company, and the premises in Stratford Place were also sold at a heavy loss; and on November 15 he resigned his seat on the board of directors, which was taken by one Frederick Edward Bramble Green.

On November 8, 1928, Mrs. Gladys Mildred Oakley, the applicant on this summons, as the registered holder of debentures of the first series to the amount of 900*l.*, began an action to recover one half-year's interest on the debentures due on September 1, 1928, and, on November 28, obtained judgment in respect of the claim. On November 16, the solicitors to the defendant company had given notice to Mrs. Oakley's solicitors that the plaintiff had begun the present action on behalf of himself and of all other holders of first and second mortgage debentures issued by the company: and on the same day, upon the plaintiff's motion, one Harold Douglas Christie was appointed receiver on their behalf. By an order made in this action on February 15, 1929, one Henry George Fuller Archer—a director of the company and of the syndicate—was added as a defendant, on behalf of himself and all other holders of second mortgage debentures issued by the company. The total loss incurred up to the date of the appointment of Christie as receiver was 32,864*l.*: he got in all the assets of the company; and they realized the sum of 2500*l.*, which was paid into Court by order of the Master. During the whole term of his directorship, despite the company's losses, the plaintiff drew his full salary, paid to him partly in cash and partly by the issue of debentures. Arrears of his salary were secured by the issue to him of debentures of the company to the amount of 12,000*l.* with interest at 7½ per cent.: and at the date of this application he was the registered holder of debentures of the first series to the amount of 2850*l.*, and of the second series to the amount of 3450*l.*; while his wife and the trustees of his marriage settlement were registered holders of debentures of the second series to the respective amounts of 2500*l.* and 3000*l.* The applicant upon this summons alleged that the plaintiff and his co-directors failed to take any steps to enforce payment of arrears of rent due from the syndicate to the company; that they allowed the company to carry on its business for nearly twelve years although heavy losses were being sustained; and that they took no steps to safeguard the interests of the debenture holders: and accordingly the summons asked that Mrs. Oakley might be made a defendant to the action, on the ground that the plaintiff had an interest adverse to her and to the other debenture holders, and asked also that the conduct of the proceedings in the action, and of the order of November 16, 1928, might be vested in her.

Wynn Parry for the summons. The summons is by way of appeal from the Master, who has refused to make the order asked for, the ground of his refusal being that the Court is necessarily very slow to take any step which may result in assets being dissipated. But this is not a case in which assets have still to be released. The Master has begged the whole question; and it may well prove that the company's chief asset is the debenture holders' possible right of action. The avowed object of such an application as this is the protection of the applicant, who is taking steps to bring in further assets.

Cleveland-Stevens for the plaintiff. A company carrying on the business of club management cannot be regarded as an ordinary trading company: *In re Swire.* (1) Even if the Court came to the conclusion that the plaintiff is not to be trusted, there would be no other course. The certificate has been settled, and the proper way of dealing with the matter is by an order for compulsory winding up.

Howard Wright for the company and the second debenture holders. Any investigation, unless something graver than mismanagement is proved, must result only in increase of costs, and cannot bring in any further assets.

MAUGHAM J. [having stated the facts:] What Mr. McCandlish was to do in return for the salary of 2000*l.* a year to be paid to him by the company does not appear, although it is quite plain that he had onerous duties on behalf of the syndicate. It is quite unnecessary to express an opinion whether the company has, as against him, any right of action likely to be fruitful. I do not know. Statements made on behalf of the applicant seem to show that some of Mr. McCandlish's dealings in relation to the affairs of the company require investigation. The company is a "one man" company: and during the whole of its career it has had dealings with another "one man" company under the same control.

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(1) (1882) 21 Ch. D. 647.

The transactions of McCandlish with the company have obviously never been investigated, and up to the present it has been impossible to investigate them. In such a case it is desirable that the conduct of the action should be given to an independent person. It is well settled that where an action is brought by the trustees of a covering deed the Court is accustomed, without raising the question of bad faith, to give the conduct of the action to some one else merely because the trustees are accounting parties. In the present case, it is best that the conduct of the action be given to independent parties, and accordingly I propose to make the order asked for on the summons.

Solicitors: *Ralph Bond, Veitch & Bilney; Turner & McCandlish; Savory, Pryor & Blagden.*

K. R. A. H.

MAUGHAM
J.

1929
July 5.

In re SULLIVAN.

DUNKLEY *v.* SULLIVAN.

[1929. S. 1257.]

Will—Life Interest in Residue to Widow—Ultimate Trusts for Issue—Direction to treat Royalties as Capital—Failure of ultimate Trusts—Intestacy in Event of Disclaimer by Widow of Life Interest—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-s.* 5, *s.* 49.

Where a will disposes of part of the property comprised in the testator's estate, the provisions of the Administration of Estates Act, 1925, as to property undisposed of by will, apply subject to the effective provisions of the will, but without regard to provisions which have become inoperative by disclaimer or lapse.

The testator, after pecuniary legacies and specific bequests, disposed of the whole of his residuary personalty, including royalties in respect of copyrights—referring in the will to the whole as "my ~~trust fund~~"—to his trustees, upon trust, to pay the income to his wife for life, and after her death in trust for his children or remoter issue. He died without having had children, and the question arose whether, if the widow disclaimed her life interest under the will, royalties received by them in respect of copyright or other interests comprised in the estate would be income or capital:—

Held, that in s. 49 of the Administration of Estates Act, 1925, the words "subject to the provisions contained in the will" should be construed to refer to the effective provisions therein contained, and accordingly that the widow, upon disclaiming, would become entitled to a life interest in residue, and would take the royalties as income.

ADJOURNED SUMMONS.

Herbert Thomas Sullivan (hereinafter called "the testator") was a nephew of Sir Arthur Sullivan, by virtue of whose will he became entitled to his musical copyrights. By his will, dated April 11, 1923, the testator appointed Edward George Dunkley and Gerald Russell (hereinafter called "the trustees") to be executors and trustees thereof, and after certain legacies and gifts, provided as follows: by clause 4: "I give devise and bequeath all my real and the residue of my personal property . . . . unto my trustees, upon trust, so long as any royalties shall be payable to me, to receive and invest the same in any securities hereinafter authorised, it being my wish that such royalties shall be treated as capital moneys"; by clause 6: "My trustees shall invest the residue of the said moneys (which, with the royalties payable to me and the investments thereof respectively, are hereinafter called 'my trust fund') in their names or in or upon any of the investments hereinafter authorised"; by clause 7: "My trustees shall pay the income of my trust fund to my wife during her life without power of anticipation during any coverture"; and clause 8 contained ultimate trusts in favour of children or remoter issue. The testator died on November 26, 1928, leaving a widow and brothers and sisters, and without having had children, and this summons was taken out by the trustees for the decision (inter alia) of the question whether his widow, if she executed a disclaimer of her life interest under clause 7 of the will, would be entitled, under the intestacy and under the Administration of Estates Act, 1925, to a life interest in the testator's residuary estate, and whether, in that event, royalties received by the trustees in respect of copyright or other interests in the estate would be income or capital, or how otherwise such royalties would be applicable.

Wilfrid Hunt for the trustees.

Farwell K.C. and *C. R. R. Romer* for the widow. The position with regard to the royalties may be altered if the widow disclaims her life interest. As to wasting assets in case of intestacy see Administration of Estates Act, 1925, s. 33, sub-s. 5. (1) The definition of "intestate" includes a person who leaves a will but dies intestate as to some beneficial interest. But a will failing to give any beneficial interest of any sort becomes wholly inoperative, and the rules as to devolution apply.

Topham K.C. and *J. H. Stamp* for a defendant representing the next of kin. This case is expressly covered by s. 49 of

(1) Sub-s. 5: "The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman."

the Administration of Estates Act, 1925. (1) Even if the widow disclaimed there would still be an effective disposition of part of the property. There would not be a total intestacy. This case really turns upon the construction of the words, "this part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will. . . . ." That means that, where there is a partial disposition, the will is read and is made effective so far as it goes, and the assets of which it does not effectively dispose will be held on trust for the persons specified in s. 46 of the Administration of Estates Act, 1925. That is the general intention of the Act. The position is quite different from that obtaining under the old law as to intestacy. Sect. 33 provides for the ascertainment of residue, and s. 46 merely gives to the widow a life interest in the residue. All the provisions dealing with the ascertainment of residue must be read in to the will.

MAUGHAM J. As the testator died without having had children the ultimate gift fails, and accordingly there is an intestacy in respect of the capital of the residue. Also, as he died after the Administration of Estates Act, 1925, had come into force, the property, save in so far as effectively disposed of by the will, falls to be dealt with in the way directed by that Act. The question raised is whether the widow, if she disclaims her life interest under the will, will be entitled, upon intestacy in respect of the residue, to a life interest in the residue, with the consequence that she will receive the royalties as income and that the special clause in the will directing that the royalties be treated as capital will not apply.

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(1) Sect. 49: "Where any person dies leaving a will effectively disposing of part of his property, this part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—

(*a*) "The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons.

(*b*) "The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."

Royalties are prima facie in the nature of wasting property, to which the rule in *Howe* v. *Earl of Dartmouth* (1) applies. Where there is a complete intestacy the provisions of s. 33, sub-s. 5, of the Administration of Estates Act, 1925, will apply, with the result, in the present case, that the widow, having (if she disclaims) the interest of a tenant for life, will be entitled, assuming that clauses 6 and 7 become inoperative, to the whole of the royalties, as that sub-section excludes the rule in *Howe* v. *Earl of Dartmouth.* (1) The only question is whether the disclaimer will render inoperative for all purposes that part of the will which it affects. In the present case the provision as to royalties was inserted in the will in order to diminish the widow's life interest for the benefit of children who, in the event, do not exist. It was clearly not inserted in order to determine the nature of interests to be taken in property in respect of which he died or might die intestate. It is true that s. 49 of the Administration of Estates Act, 1925, might be construed to mean that the provisions of that part of the Act shall have effect subject to the whole of the provisions in the will, including any provisions which become inoperative by virtue of disclaimer, lapse, or other event. I am satisfied that that is not the true construction of the section. The phrase "subject to the provisions contained in the will" is intended to show that the provisions of the Act relating to property not disposed of by will must take effect subject to all the provisions of the will which remain operative and effective. In my view, therefore, the widow, upon executing a disclaimer, will be entitled to a life interest in the residue of the testator's estate, including royalties receivable by the trustees.

Solicitors: *Charles Russell & Co.; Piesse & Sons.*

(1) (1802) 7 Ves. 137.

K. R. A. H.

MAUGHAM J.

1929

June 6, 7.

In re SMITH.

VINCENT *v.* SMITH.

[1928. S. 195.]

Intestacy—Tenant for Life—Trustees for Sale—Repairs—Application to Court—Jurisdiction of Court—"Permanent improvements"—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 64, 83, 102, *Sch. III., Parts I. and II.—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-ss.* 1, 2, 3—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 33, *sub-s.* 5; *s.* 48.

Sect. 28, sub-s. 2, of the Law of Property Act, 1925, has not deprived the Court of its inherent jurisdiction to decide, in a proper case, that the cost of certain repairs to settled land ought to be borne by capital.

The intestate died possessed of an estate which included freehold cottages in a bad state of repair. After the death the local authority served notices to carry out repairs, including reroofing and pointing of chimney stacks. Some of these repairs, in view of the state of the property at the intestate's death, would have amounted to "permanent improvements"; and this summons, issued upon the application of the administrator of the estate, raised questions as to the incidence of their cost:—

Held, (1.) that the cost of repairs which are "improvements" within Parts I. and II. of the Third Schedule to the Settled Land Act, 1925, may properly and prima facie ought to be borne by capital; (2.) that works not being "improvements" within these parts of that Schedule may properly be so borne if they are shown to be works in the nature of permanent improvements; and (3.) that ordinary current repairs and "casual repairs"—i.e., those carried out in the ordinary course, generally at the cost of the tenant for life—cannot be treated as being "permanent improvements."

Held, further, that s. 28, sub-s. 2, of the Law of Property Act, 1925, does not compel Settled Land Act trustees to pay the costs of all repairs out of income, and does not deprive them of their discretion under s. 102 of the Settled Land Act, 1925.

In re Robins [1928] Ch. 721 followed.

Dictum in *In re Gray* [1927] 1 Ch. 242 and decision in *In re Whitaker* [1929] 1 Ch. 662 considered.

Doctrine in *In re Hotchkys* (1886) 32 Ch. D. 408 applied.

SUMMONS.

James Bogle Smith (hereinafter called "the intestate") died intestate on May 3, 1927, leaving a widow but no children surviving. He left also many descendants of uncles and aunts, two of them being defendants to this summons. Administration was granted to the widow, Mary Louisa Smith, a defendant to the summons, and to the plaintiff, Henry Edward Vincent. The estate was substantial, and consisted largely of cottage property, all of the cottages being freehold. At the date of the intestate's death the cottages, sixteen in number, were in a very bad state of repair, particularly as to roofs and chimney stacks. Since his death, the local authority on several occasions served divers notices requiring repairs of a somewhat serious character, including conversion of certain trough closets into pedestal closets, a substantial amount of re-roofing of various houses, and the pointing particularly of chimney stacks, and of other miscellaneous matters of repair, some of which were in the nature of a permanent improvement of the property, as compared with its condition at the date of the intestate's death. As the intestate left a widow, s. 46 of the Administration of Estates Act, 1925, applied, she being entitled under sub-s. 1 (1.) (*a*) thereof to a life interest in the personal chattels: and the powers given to the personal representatives by s. 39 were exercisable. No material change in the condition of the property having taken place since the date of the death, this summons was taken out by the plaintiff and the widow for the determination (inter alia) of the questions: (*a*) whether the repairs required at the death of the intestate ought to be borne out of capital irrespective of the nature of the repairs; (*b*) whether all repairs which were improvements within Parts I. or II. of the Third Schedule to the Settled Land Act, 1925, ought to be borne out of capital; and (*c*) whether repairs which were not improvements within Parts I. or II. of the Third Schedule aforesaid ought to be borne out of income, even though they might constitute permanent improvements.

Wilfrid Hunt for the plaintiff. Sect. 48 of the Administration of Estates Act, 1925 (1), gives power to purchase or redeem the widow's life interest. It is felt desirable to do that in the present case, in view of the large number of beneficiaries.

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(1) Sect. 48: " Where a surviving wife or husband is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative) or, where the tenant for life is the sole personal representative, with the leave of the court, purchase or redeem such life interest (while it is in possession) by paying

[He referred also to s. 28, sub-ss. 1, 2 and 3, of the Law of Property Act, 1925. (1)]

There have been several decisions on the question whether or not the general jurisdiction of the Court to do what is fair and apportion expenditure is still on foot, or whether there is a complete code under the property legislation of 1925.

the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest."

(1) Sect. 28, sub-s. 1: "Trustees for sale shall, in relation to land or to manorial incidents, and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority: and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale.

"All land acquired under this sub-section shall be conveyed by the trustees on trust for sale.

"The powers conferred by this sub-section shall be exercised with such consents (if any) as would have been required on a sale under the trust for sale, and when exercised shall operate to overreach any equitable interests or powers which are by virtue of this Act or otherwise made to attach to the net proceeds of sale as if created by a trust affecting those proceeds.

(2.) "Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested.

(3.) "Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust) the trustees for sale may, with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale:—

(*a*) "partition the land remaining unsold or any part thereof; and

(*b*) "provide (by way of mortgage or otherwise) for the payment of any equality money;

P. H. L. Brough for the widow. Some at any rate of the repairs ought to be charged to capital. The controversy is whether the jurisdiction of the Court is the same as it was before 1926, or whether the Property Statutes of 1925 amount to a complete code which provides for every case. In the present case the widow is in a position similar to that of a tenant for life under an ordinary trust for sale in which the testator has inserted an express provision excluding the rule in *Howe* v. *Earl of Dartmouth.* (1) If the property legislation of 1925 has left the Court a discretion, the present is a very proper case in which to exercise it by deciding that some proportion at any rate of the repairs ought to be thrown on capital. In apportioning the cost of the repairs between capital and income the Court is entitled to take into consideration the fact that all of the repairs were necessary at the date of the intestate's death : *In re Freman.* (2) In the case of a widow coming into the estate of an intestate with an accumulation of repairs, justice would be done by ordering that the cost of the repairs be charged to capital ; it should not be borne by the widow : *In re Bird* (3) ; *In re Gray* (4) ; *In re Robins* (5) ; *In re Whitaker* (6) ; *In re Conquest.* (7) In none of the cases has it been decided that any kind of

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and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale or, where any part of the land becomes settled land, by a vesting deed, or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given :

“ Provided that—

(1.) “If a share in the net proceeds belongs to a lunatic or defective, the consent of his committee or receiver shall be sufficient to protect the trustees for sale:

(2.) “If a share in the net proceeds is affected by an incumbrance, the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.”

(1) (1802) 7 Ves. 137.

(2) [1898] 1 Ch. 28, 31.

(3) [1927] 1 Ch. 210.

(4) [1927] 1 Ch. 242, 247.

(5) [1928] Ch. 721.

(6) [1929] 1 Ch. 662.

(7) [1929] W. N. 141.

repair which may be paid for by the trustees out of income under s. 83 of the Settled Land Act, 1925 (1), but is not included in Part I. or Part II. of the Third Schedule must be paid for out of income. Substantial rebuilding cannot be described as "structural addition or alteration." The Court is entitled to distribute the burden of the repairs equitably between the tenant for life and the remainderman, and is entitled also to take into account the disadvantage under which the estate started: *In re Farnham's Settlement* (2); *In re Hotchkys.* (3) The effect of the cases is that, although a trustee comes to the Court asking how to exercise his discretion, the Court will give directions just as if the trustee had no express powers of management. It would be fair to throw upon capital the cost of repairs that were necessary at the date of the death of the intestate. Also, repairs of permanent benefit to the estate ought to be paid for out of capital. Notwithstanding the property legislation of 1925 the Court still has a discretion which can be exercised if trustees come to the Court for directions.

G. P. Slade for two defendants representing the next of kin. The provisions of the property legislation of 1925 have so extensively covered the ground relating to repairs that the duty of trustees is fully defined, and there is no longer any scope in the Court to exercise jurisdiction and to say that repairs are to be dealt with in a manner not provided for by that legislation. In *In re Hotchkys* (3) no power was given to the trustees, and there was nothing in the will to show what was to be done in regard to repairs and management. The position now is very different from what it was at the date of that case. First (see Law of Property Act,

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(1) Sect. 83: "Improvements authorised by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the works mentioned in the Third Schedule to this Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes."

(2) [1904] 2 Ch. 561, 567.

(3) 32 Ch. D. 408, 417.

1925, s. 28, and Settled Land Act, 1925, s. 102 (1)), there cannot be any case in which repairs are necessary which the trustees cannot find some power to do under the Acts. These powers are given to trustees for sale whether there

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(1) Sect. 102, sub-s. 1: "If and as long as any person who is entitled to a beneficial interest in possession affecting land is an infant, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the court whereby they or their predecessors in office were appointed to be such trustees expressly provides to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the court on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land on behalf of the infant, and in every such case the subsequent provisions of this section shall apply.

(2.) "The trustees shall manage or superintend the management of the land, with full power—

(*a*) "to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise; and

(*b*) "to erect, pull down, rebuild, and repair houses, and other buildings and erections; and

(*c*) "to continue the working of mines, minerals, and quarries which have usually been worked; and

(*d*) "to drain or otherwise improve the land or any part thereof; and

(*e*) "to insure against loss by fire; and

(*f*) "to make allowances to and arrangements with tenants and others; and

(*g*) "to determine tenancies, and to accept surrenders of leases and tenancies; and

(*h*) "generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum and the interest of any principal sum, charged on the land.

(4.) "This section has effect subject to an express appointment by the settlement, or the court, of trustees for the purposes of this section or of any enactment replaced by this section.

(5.) "Where any person is contingently entitled to land, this section shall, subject to any prior interests or charges affecting that land, apply until his interest vests, or, if his interest vests during his minority, until he attains the age of twenty-one years.

"This sub-section applies only where a person becomes contingently is a minority or not: *In re Gray* (1); *In re Robins.* (2) Under the Law of Property Act, 1925, s. 28, sub-s. 1, trustees can do any repairs of any character. Sect. 102 of the Settled Land Act, 1925, is so worded that there can be no case in which the trustees have no power at all to repair. Had Tomlin J. been referred to all the relevant sections of the Settled Land Act, 1925, he would not have felt the difficulty which he did feel in *In re Robins.* (2) Trustees have, in addition to power under s. 102, to pay for repairs out of income, also power, under s. 28 of the Law of Property Act, 1925, to pay for authorized repairs out of capital. Also, it is open to them to do justice between parties without going to the Court. Sect. 64 of the Settled Land Act, 1925 (3), deals expressly with the Court's jurisdiction. It gives to trustees power to do, by leave of the Court, things not within their other powers. Trustees for sale and administrators are, by reference, given the powers of a tenant for life; and therefore that section has some reference to the present case, even though the land is not

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entitled under an instrument coming into operation after the commencement of this Act.

(6.) "This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest of the infant or person contingently entitled as aforesaid arises, and has effect subject to the terms of that instrument and to the provisions therein contained."

(1) [1927] 1 Ch. 242.

(2) [1928] Ch. 721, 735.

(3) Sect. 64: (1.) "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

(2.) "In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing or arrangement; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settlement; and 'effected' has the meaning appropriate to the particular transaction; and the references to land include references to restrictions and burdens affecting land."

settled land. The section is in any case relevant as showing what jurisdiction the Legislature intended to confer on the Court outside that given by the Act. As it conferred upon the Court a jurisdiction from which improvements authorized by the Act were excepted, there is a strong presumption that it did not intend the Court to have jurisdiction as to these improvements. Anything which is a structural alteration or addition within the meaning of these provisions is something which the Court may allow out of capital. As to reroofing see *In re Gaskell's Settled Estates.* (1) There the reroofing was allowed, because what had been done amounted substantially to the building of a new roof and was not mere patching. In the present case the reroofing does not amount to the provision of a new roof: it is merely a replacing of defective tiles. On the evidence there is nothing to show that new roofs were necessary. The repairs were neither additions to nor alterations in the building. In *In re Robins* (2) Tomlin J. did not base his decision on any of the provisions of the Settled Land Act, 1925. He proceeded on the general ground that he thought that the repairs were such as ought to be paid for out of capital. The extent to which the replacing of an existing roof is an addition or alteration is a question of fact: *In re Whitaker* (3); that decision is an express authority for the view that the true principle is to determine whether the repairs do or do not fall within the Third Schedule to the Settled Land Act, 1925, and, if they do, to decide how much of the cost of them is to be borne by capital and how much by income. See also Administration of Estates Act, 1925, s. 33, sub-s. 5. (4) On the grammatical construction of the words the phrase "properly attributable" refers to outgoings. Even if it referred to repairs, it would not affect the argument which has been put forward on the provisions of the property legislation of 1925. Sect. 33 of the Administration of Estates Act, 1925, is non-committal, and carries the matter no further. If the trustees had a discretion, and the repairs were of such a nature that to execute them would deprive the tenant for life of income for any length of time, it would be the duty of the trustees to execute them very slowly or even to sell the property. *In re Courtier* (1) was a case concerning leaseholds, and it was there held that the expense of putting property into a state of repair in respect of repairs necessary at the date of the death ought to be borne out of capital. There is no authority that, in regard to the application of the principle, freeholds were treated as being on the same footing as leaseholds, and even if they were the Legislature has now covered the ground: *In re Courtier* (1); followed in *In re Betty.* (2)

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(1) [1894] 1 Ch. 485.

(2) [1928] Ch. 721, 726.

(3) [1929] 1 Ch. 662, 667.

(4) Sect. 33, sub-s. 5: "The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rents, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman."

The reasoning of the judgments in those cases, and the absence of authority as to freeholds, indicate that the application of the principle to repairs necessary at the date of the death was even under the old law confined to leaseholds. The property legislation of 1925 covers the ground, and the true principle is to throw on to capital the cost of the repairs which come under the Third Schedule to the Settled Land Act, 1925: *In re Gray* (3); *In re Whitaker* (4); *In re Robins* (5) is distinguishable.

MAUGHAM J. [having stated the facts:] In the present case, the question is submitted by the plaintiff and, in effect, the first defendant, for the assistance of the Court in dealing with the repairs which I have mentioned. I am taking it to be a case in which the administrators have not exercised their discretion to pay the costs out of income, but are submitting to the Court the question how they ought to be borne

(1) (1886) 34 Ch. D. 136, 139.

(2) [1899] 1 Ch. 821.

(3) [1927] 1 Ch. 242.

(4) [1929] 1 Ch. 662.

(5) [1928] Ch. 721, 736.

between the parties so far as that question can be answered by dealing with the three specific queries which I have already stated.

The point is one as to which there has been some difference of opinion in the minds of the judges before whom it has come. The first case is *In re Gray* (1), which came before Clauson J. That was a case in which the trustees had executed repairs and had paid for them out of income, and where further repairs were contemplated. The assignee of the tenant for life had come to the Court and objected to the further repairs being paid for out of income. I understand the learned judge as having decided that the trustees had power to pay for these repairs out of income; they had a discretion and they chose to exercise that discretion and pay for them out of income, and it was not for the Court to interfere. That view of the judge's decision was the view taken by Tomlin J. in *In re Robins*. (2) It is, however, fair to say that Clauson J. did make use of expressions tending to show that in his then view the property legislation of 1925 was intended to form, as far as possible, a complete code, and that, accordingly, the equitable powers of the Court, as explained in *In re Hotchkys* (3), had been taken away. Tomlin J., in *In re Robins* (2), after carefully considering the decision of Clauson J., expressed a different opinion. The case, as reported, does not clearly explain the nature of the repairs in relation to which the trustees were seeking the opinion of the Court whether the costs should be paid out of income or out of corpus. All that we know is that the city surveyor of Birmingham had called the attention of the parties to the defective condition of a particular freehold house forming part of the trust estate, and the surveyor of the trust estate thereupon prepared a specification and plan, and obtained estimates for carrying out the necessary work.

I do not think that Tomlin J. decided the case on the ground that the repairs in question could have been justified as coming within Parts I. or II. of the Third Schedule to the

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(1) [1927] 1 Ch. 242.

(2) [1928] Ch. 721, 736.

(3) 32 Ch. D. 408.

Settled Land Act, 1925, as an improvement. It fell to the Court in that case to determine whether repairs which were not such as could be justified as "improvements" could, in a proper case, since the legislation of 1925, be directed to be paid out of corpus, if trustees for sale were asking the question of the Court and were pro tanto surrendering their discretion. Tomlin J. pointed out that under the Town Improvements Clauses Act, 1847—the Act under which notice was given—the authority has power to sell the property in question, and to "apply the proceeds in repayment to themselves of the money expended in executing the work"; and said that he would "have no difficulty in coming to the conclusion that, apart from recent legislation, it is one of those cases in which the Court would undoubtedly have held that this expenditure is of such a character that it ought, upon the general principles governing the Court in matters of this kind, to be borne by capital, so that the burden is distributed between capital and income, capital losing the sum and income losing the interest on the sum." He then proceeded to consider the sections the effect of which I have shortly stated, placing reliance upon the circumstance that under s. 102 of the Settled Land Act, 1925, the words used are "the trustees may pay," not "the trustees shall pay," the expenses of management, and stating that, in his view, "under that sub-section of s. 102 there rests upon the trustees a duty to exercise a proper discretion, and that if they have in fact incurred expenses in relation to repairs, it is their duty to consider whether those expenses are expenses which properly they ought to pay out of income or out of capital." He then held that under s. 28, sub-s. 2, of the Law of Property Act, 1925, upon its true construction, it was not obligatory upon the trustees to pay the costs of all repairs out of income, and that the section did not deprive the trustees of their discretion under s. 102 of the Settled Land Act, 1925. That being his view, and it being his view also that the expenditure ought to be borne by capital, he decided as a matter of express decision that the repairs should be paid for out of corpus.

I take this opportunity of repeating what I have said on previous occasions, that where a learned judge, after consideration, has come to a definite decision on a matter arising out of this exceedingly complicated and difficult legislation, it is very desirable that the Court should follow that decision, and accordingly I should be strongly inclined, whatever my own view was, to follow what I take to be the positive decision of Tomlin J. I would add that I have the authority of Clauson J. himself, in *In re Conquest* (1), for taking the view that what he said in *In re Gray* (2) is a mere matter of dictum.

I now have to consider the case of *In re Whitaker.* (3) That, again, was a case concerning a dangerous structure notice served by a local authority on trustees for sale in respect of houses forming part of a trust estate. The summons, issued by one of the trustees, raised the question whether the expenditure incurred to comply with the notice was to be met out of capital or income, or partly out of each. The learned judge found no difficulty in reconciling *In re Gray* (2) with *In re Robins.* (4) Also, he found that the work done in the case before him was work included either in para. xxv. of Part I. or para. v. of Part II. of the Third Schedule to the Settled Land Act, 1925—i.e., that the expenses incurred could be justified as an improvement, under the Settled Land Act, 1925, the cost of which was properly payable out of capital, and that the whole sum expended in complying with the requirements of the local authority ought to be provided out of capital.

I entirely agree with the view of the learned judge that the provisions of the Settled Land Act, 1925, relating to improvements—including particularly the provisions contained in the Third Schedule—must be considered in dealing with this question; and it seems to me quite clear that if expenditure on anything in the nature of repairs can be justified as coming within Part I. or Part II. of that Schedule, the Court has jurisdiction to say that that expenditure ought, in a proper case, to be borne by capital. It was not necessary for the learned judge to consider or decide the question which Tomlin J. decided in *In re Robins* (1), and I do not understand that he did so. Accordingly, the decision in *In re Robins* (1) stands, and I propose to follow it. I will add that, had the matter been res integra, I should have been disposed to come to the same conclusion as that which I understand the learned judge to have reached. I do not consider that the decision in *In re Hotchkys* (2), or any other decision to which my attention has been called, justifies me in coming to the conclusion that repairs required at the death of the intestate ought to be borne out of capital irrespective of their nature. The position in such a case as this, where there is an intestacy, and the Court is not concerned with the express intention of the deceased, is that the widow, as tenant for life, is tenant for life of the property as it existed at the intestate's death. There is no question, in the case of a freehold, of an obligation on the intestate to a third party to do repairs, and I cannot derive from any section of the Administration of Estates Act, 1925, any assistance in favour of the view that a tenant for life has any right to have property which was in a bad state of repair when she obtained her interest in it, put into a good state of repair at the expense of the remainderman. Accordingly, the first question cannot be answered in the affirmative. I feel no difficulty in following *In re Robins* (1), and in deciding that s. 28, sub-s. 2, of the Law of Property Act, 1925, does not take away the discretion of the Court to decide, in a proper case, that the cost of certain repairs ought to be borne by capital; and it follows that the cost of repairs which are "improvements" within Part I. or Part II. of the Third Schedule to the Settled Land Act, 1925, may properly and prima facie ought to be borne by capital. Also, following the same decision, and bearing in mind the equitable rules laid down in *In re Hotchkys* (2) and *In re Farnham's Settlement* (3), I have come to the conclusion that repairs which are not within those parts of that

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(1) [1929] W. N. 141.
(2) [1927] 1 Ch. 242.
(3) [1929] 1 Ch. 662.
(4) [1928] Ch. 721.

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(1) [1928] Ch. 721.

(2) 32 Ch. D. 408.

(3) [1904] 2 Ch. 561.

MAUGHAM J.

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Schedule may properly be borne out of capital, if it be established that they are works in the nature of permanent improvements of the trust property. In considering whether they are or are not, the surveyor and other persons in charge of the matter are bound to take into account the state of repair of the property at the date of the death of the intestate, so that, in effect, an operation which in the ordinary way might not constitute a permanent improvement may be treated as such if, on the one hand, it is permanent, and, on the other, it substantially improves the state of the property as compared with what it was at the date of the death of the intestate. But what the Courts have sometimes called "casual repairs"—i.e., those which fall to be carried out in the ordinary course by a person in possession of property and the cost of which is generally payable by the tenant for life—cannot be treated as coming within the description "permanent improvements."

Solicitors: *Taylor, Jelf & Co., for Herbert Denison, Leeds, and for Trethowan & Vincent, Salisbury.*

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May 10, 14, 15, 16, 29, 30; June 27, 28; July 31.

In re HOME AND COLONIAL INSURANCE COMPANY, LIMITED.

[0029 of 1929.]

Company—Voluntary Winding Up—Misfeasance of Liquidator—Participation Agreement between two Insurance Companies—Proof of Debt—Issue of Reinsurance Policies not ascertained by Liquidator—Proof wrongly admitted and Money wrongly paid—Liability of Liquidator—Account stated in respect of void Contract—Stamp Act, 1891 (54 *&* 55 *Vict.* c. 39), *s.* 93—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 4, 22—*Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 184, 186, 188, 215.

The H. Company entered into an agreement for reinsuring marine risks with the L. Company. Later, it was voluntarily wound up, and B., the liquidator, agreed the L. Company's claim for a large sum, and paid dividends in respect of the claim. Following the practice of the company, B.—notwithstanding the provisions of the Stamp Act, 1891, and the Marine Insurance Act, 1903—treated the agreement and the claim under it as valid. After the dissolution of the H. company he was advised that he should have disallowed the claim, and the dissolution was annulled, but an action to recover the money was dismissed, as no mistake of fact by B. was proved. On a misfeasance summons by a creditor of the company:—

Held, (i.) that a liquidator in the voluntary winding up of a limited company is not, apart from negligence, liable for wrongly admitting a claim by an alleged creditor:

(ii.) that the liquidator did not, in the circumstances, fulfil his duty of investigating the claim of the L. Company, and was therefore liable as for misfeasance under s. 215 of the Companies (Consolidation) Act, 1908, for admitting the claim of the L. Company since it was in fact an invalid one:

(iii.) that the Articles of a limited company cannot amount to a contract between the company and its liquidator, and that he could not therefore rely on an Article absolving officers of the company from liability except for fraud:

(iv.) that the combined effect of ss. 93 and 97 of the Stamp Act, 1891, is that a contract of sea insurance not expressed in a sea insurance policy is null and void:

(v.) that, where an agreement is wholly void, items alleged to be due in respect of it are not a proper basis for an action on an account stated, and that a proof based on an account stated in such circumstances must be rejected:

(vi.) that the position of a liquidator examining a proof for admission or rejection in a winding-up is the same as that of a trustee in bankruptcy, as decided in *In re Van Laun* [1907] 2 K. B. 23.

(vii.) (following *In re Sunlight Incandescent Gas Lamp Co., Ld.* (1900) 16 Times L. R. 535) that, in fixing the amount which a person liable for misfeasance under s. 215, sub-s. 2, of the Companies (Consolidation) Act, 1908, should be ordered to pay or contribute to the assets of the company, the Court has a discretion, and that, in the special circumstances, the liquidator should be ordered to contribute, by way of compensation, only such a sum as would enable all creditors to be paid in full with interest at 5 per cent.

Misfeasance Summons.

The following statement of facts is taken from his Lordship's judgment :—

This is a misfeasance summons taken out on January 16, 1929, claiming against Mr. Harold Edmund Barham, the liquidator of the company in the voluntary winding up, a declaration as the result of which he would become liable to pay a sum of 38,172*l.* 13*s.* 2*d.* with interest. The circumstances are of a very unusual nature and raise questions of law of great importance.

The company was incorporated on September 28, 1916. Its principal object was to insure against every description of marine risk and its business in the main has been confined to risks of that character. The company, which had been incorporated as a private company with a capital of 100*l.*, increased its capital in November, 1916, to the sum of 100,000*l.*, divided into 100,000 shares of 1*l.* each. Some 28,492 shares were issued. The firm of Harris, Marrian & Co., well known and experienced insurance brokers, were appointed by an agreement dated November 9, 1916, to be the managers of the business of the company with absolute discretion as to accepting risks and effecting reinsurance of all or any risks undertaken by them. They were to be remunerated by way of commission on the net premium of the company, which was in the first instance at the rate of 7½ per cent. Mr. Walrond, a partner in the firm, was appointed director and chairman of the company. On January 30, 1918, the company entered into an agreement with the London Guarantee and Accident Company, Ld. (hereinafter called " the London Guarantee Company "), which is described as a participation agreement. In this judgment I will use the same name, although in fact it is a contract for the reinsurance of marine risks undertaken by the London Guarantee Company in a form which of late years has become not uncommon. The company is described in the agreement as a participator, and becomes bound to accept what is called a "quota participation" of all and every risk accepted by the marine representative of the London Guarantee Company. The liability of the company was to commence automatically at the same time as the liability of the London Guarantee Company, and so that any cover given directly or indirectly by the London Guarantee Company immediately became binding on the participator. Provisions were contained in the agreement precluding the participator from a right to have any particulars in regard to risks accepted, or any right to interfere in the settlement of claims; and there was a statement that, the agreement being executed in a spirit of trust, the participator was absolutely bound in every case to follow the fortunes of the London Guarantee Company. There is a significant provision for arbitration. Disputes or differences which might arise were to be settled by an equitable and liberal interpretation of the provisions of the agreement according to the spirit thereof. The arbitrators were, it is true, to be disinterested managers or underwriting officials of British Marine Insurance Companies, but they were expressly relieved from all judicial formalities and from following what is described as "the strict rule of the law." This agreement was negotiated on behalf of the company by Messrs. Harris, Marrian & Co. It proved to be a most disastrous arrangement, and the exceedingly heavy losses sustained by the company according to the terms of the agreement made it impossible for the company to continue to carry on business after the end of the year 1920. The participation agreement was terminated by a notice under it as at December 31, 1920. Negotiations ensued between the company and the London Guarantee Company with a view to ascertain if there was any course other than liquidation which might be taken by the company, and various suggestions were made; but it was intimated on August 9, 1922, that the London Guarantee Company would prefer that the company

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should be wound up. Accordingly an extraordinary resolution was passed on October 3, 1922, to wind up the company, and Mr. Barham, a chartered accountant, the respondent to the summons, was appointed liquidator for the purpose of the winding up. At the date of the resolution the amount alleged to be due under the participation agreement was roughly 72,000*l.* Claims were still coming in in respect of risks of which the company were reinsurers under the agreement; and the total claim of the London Guarantee Company ultimately amounted to 89,100*l.* Other claims against the company were comparatively trifling, and indeed amounted only to the sum of 5600*l.*, including substantial sums for directors' fees and including also a sum of 2470*l.* alleged to be due to Messrs. Harris, Marrian & Co. under their management agreement. There can be no doubt whatever that apart from the claim of the London Guarantee Company the company was completely solvent.

The company had issued 28,492 shares of 1*l.* each, not all of which had been fully paid, and the liquidator made calls on those shares which were partly unpaid. The London Guarantee Company's claim was examined in the sense that the liquidator sent a clerk to their offices to see that the correct proportions of losses and premiums had been duly debited and credited to the company, and upon being satisfied as to this he ultimately agreed the claim at the sum of 89,100*l.* Dividends were paid to the creditors from time to time, and the sum of 38,172*l.* 13*s.* 2*d.* was paid in all to the London Guarantee Company on various dates, the first dividend being paid on December 17, 1924, at the rate of 3*s.* in the £, and the final dividend on March 8, 1927. The dividends amounted in all to just short of 8*s.* 7*d.* in the £. The total dividends paid to creditors or claimants other than the London Guarantee Company was 2408*l.* 10*s.* 7*d.* On May 31, 1927, the final general meeting of the company was held pursuant to the provisions of s. 195 of the Companies Act; and on June 1, 1927, the liquidator made the usual return to the Registrar of Companies, which was registered by him, with the result that the company was deemed to be dissolved on September 1, 1927. It was not till the following year that Mr. Walrond, who claimed to be both a creditor and a shareholder of the company, called the attention of the liquidator to the decision of the Court of Appeal in the case of *In re National Benefit Assurance Co. Ex parte English Insurance Co.* (1), and he informed the liquidator that in his view that case was on all fours with the case of the Home and Colonial Insurance Company in every respect, since no policies had been issued in respect of the reinsurances under the agreement. The liquidator accordingly was advised that the claim of the London Guarantee Company ought not to have been allowed. He took steps to obtain an order annulling the dissolution of the company in order that he might take the necessary proceedings to recover the moneys paid to the London Guarantee Company in respect of their proofs. An action was then brought on July 27, 1928, in the King's Bench Division. It was tried before Wright J. on December 5 and 6, 1928, and the liquidator was the only witness called. On December 7, 1928, the learned judge delivered judgment, dismissing the action with costs upon the ground that having regard to the evidence of the liquidator none of the sums appeared to have been paid by him under a mistake of fact, inasmuch as he admitted that he would have paid those sums even if he had been told that there were no policies. On January 16, 1929, the present misfeasance proceedings were commenced by Mr. Charles May, a creditor of the company, for director's fees, claiming repayment by the liquidator of 38,172*l.* and interest, the whole of which is alleged to have been wrongly paid to the London Guarantee Company.

Lionel Cohen K.C. and *H. I. P. Hallett* for the applicant. A liquidator can be liable for payment wrongly made, even though he has not been negligent: *In re Windsor Steam Coal Co.* (1901), *Ld.* (2) That case is in all respect analogous to the present case and governs it.

Wilfrid A. Greene K.C. and *E. G. Palmer* for the respondent. The first ground of argument is the quite broad point as to

(1) [1928] Ch. 74.

(2) [1928] Ch. 609.

the position and duties of a liquidator. The respondent contests wholly and radically the proposition that there is such a thing as reasonable discharge of a statutory duty. To say that there is is to impose upon a liquidator a duty which the Legislature never imposed upon him. The position of a liquidator is to a certain extent sui generis. The matter must be dealt with on the footing that a duty is imposed upon him by statute. On the facts of this case there has been no breach of that duty. The duty is clearly laid down: but the applicant would put the liquidator in the position of an insurer. His contention is that the statute imposes upon the liquidator a duty to pay the debts of the company, that he has paid something which is not a debt, and that he is therefore liable. That contention compels the liquidator to guarantee the accuracy of everything that he does, and no mistake, however bona fide, could be pleaded as a defence. The matter depends upon the facts of each case. The liquidator discharges his duty if he acts with the skill and competence of a professional man, undertaking for a reward the task of winding up the affairs of a company: if he fulfils that requirement, he performs his duty to the full. The facts in the present case suffice to bring the liquidator well within this rule. There was nothing to suggest to him that the directors, when acting under this document, were doing something which they were not legally bound to do. The proper inference from the facts is that, not merely did the liquidator do all that he could be expected to do with regard to taking advice, but the advice which was given to him was that he need not be anxious. It is impossible precisely to indicate given circumstances in which legal advice must be sought. Under the Stamp Act, Harris, Marrian & Co. were not entitled to their commission, and the directors, in so far as they had been paying that commission, had been misapplying the company's funds. The commission is calculated on the net premium income, including that arising under this marine insurance treaty: and that is something to which they were not entitled. As to the position of the Court in dealing with a document of this kind, see *Royal Exchange*

Assurance Corporation v. *Sjoforsakrings Aktiebolaget Vega.* (1) So far as this policy was concerned, the liquidator was entitled to assume that the solicitors would call his attention to any important point, and also to assume that when it was before the Court there was no point. In the circumstances he was entitled to assume that the Court thought that there was no point requiring investigation: *Fisher* v. *Liverpool Marine Insurance Co.* (2) The contract in the slip contains an implied undertaking to issue a policy. Even if in a treaty of this kind there is such an obligation, it is not one which can be enforced: *In re Windsor Steam Coal Co.* (1901), *Ld.* (3); *In re Law Car and General Insurance Corporation, Ld.* (4); *Eastern Carrying Insurance Co.* v. *National Benefit Life and Property Assurance Co., Ld.* (5); *Attorney-General* v. *Forsikringsaktieselskabet National of Copenhagen.* (6) The only text-book in which treaties are referred to is Porter, Laws of Insurance, p. 271. See also *In re National Benefit Assurance Co.* (7); *In re Harrington Motor Co.* (8) The real question is whether a contract of this kind was in the nature of joint adventure or of partnership: *Insurance Co. of North America* v. *North China Insurance Co.* (9) The only question there litigated was whether under that covenant the defendants were liable to indemnify the plaintiffs. There was nowhere any suggestion that that covenant infringed the statute, as it clearly did: *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega.* (10) The real question, broadly speaking, is whether the liquidator, to whom must be ascribed the ordinary skill and knowledge of a business man—including knowledge of accounts—ought to have taken the view that this matter required specific advice. It involves the question of the extent to which, in such circumstances, a liquidator ought to be supposed to divine the existence of a legal difficulty. In the last resort, the Court must imagine itself in the liquidator's place, and consider whether it is right to say that the matter is one on which he should have taken advice. There is little authority on the duties of a liquidator. There are sections of the Act dealing with voluntary liquidation, but the Act does not purport to contain a full statement of the liquidator's duties. It has to cover, in addition to them, a vast variety of different sorts of cases and circumstances. No detailed code can be found: s. 184, Companies (Consolidation) Act, 1908. (1) In the case of a voluntary liquidation, the company is contemplated as continuing to carry on its business, and its corporate estate remains: s. 186, Companies (Consolidation) Act, 1908. (2) The applicant contends that

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(1) [1902] 2 K. B. 384.
(2) (1874) L. R. 9 Q. B. 418, 423.
(3) [1929] 1 Ch. 151, 153.
(4) [1911] W. N. 91.
(5) (1919) 35 Times L. R. 292.
(6) (1924) 40 Times L. R. 639.
(7) [1928] Ch. 74.
(8) [1928] Ch. 105.
(9) (1898) 14 Times L. R. 334
(1898) 15 Times L. R. 101.
(10) [1902] 2 K. B. 384, 394.

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(1) Sect. 184: "When a company is wound up voluntarily the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved."

(2) Sect. 186. The following consequences shall ensue on the voluntary winding up of a company:—

"(i.) The property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company:

"(ii.) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them:

"(iii.) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof:

"(iv.) The liquidator may, without the sanction of the court, exercise all powers by this Act given to the liquidator in a winding up by the court:

"(v.) The liquidator may exercise the powers of the court under this Act of settling a list of contributories, and of making calls, and shall pay the debts of the company, and adjust the rights of the contributories among themselves:

"(vi.) The list of contributories shall be prima facie evidence of the liability of the persons named therein to be contributories:

"(vii.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two:

"(viii.) If from any cause whatever there is no liquidator acting, the court may, on the application of a contributory, appoint a liquidator:

"(ix.) The court may, on cause shown, remove a liquidator, and appoint another liquidator."

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the Legislature, in these few and concise words, has intended to create out of a liquidator a very special kind of person with all the obligations, and none of the advantages, of a trustee under the old law. See also s. 188 of the Act (1), which provides for the creditors' meeting. It cannot have been intended by the Legislature that business people in that position should undertake this enormous liability as guarantors. As to the position of a liquidator, see *In re London and Caledonian Marine Insurance Co.* (2) Whether he does or does not know of the debt he is under a duty to pay it, and if he does not pay it, he has committed a breach of the statutory duty: *In re Anglo-Moravian Hungarian Junction Ry. Co. Ex parte Watkin* (3); *In re Oriental Inland Steam Co. Ex parte Scinde Ry. Co.* (4); *Knowles* v. *Scott* (5); *Pulsford* v. *Devenish.* (6) As the liquidator is under statutory duty, if he knows of the debt but has not paid it the unpaid creditor can sue, because there has been a breach of the duty. But if he did not know of the debt, he would not be liable, despite the breach, and therefore the statutory duty is not an absolute duty. If he has taken all reasonable steps to ascertain the debts, and has paid those ascertained, he is not liable for omissions. Conversely, if, after exercising all reasonable care, he includes and pays something which is not a debt, he is not liable. A liquidator is under a duty to use the skill, diligence, competence, and knowledge properly attributable to a professional person. If he so acts, he has fulfilled the statutory duty, which must be subject to that qualification. A voluntary liquidator is an officer of the company, which retains its corporate existence and powers. The directors may act if allowed to do so; and in so far as they do not act, the liquidator takes their place and is just as much an officer of the company as is a director: see art. 157. (1) It is a fair implication that, when a company appoints an officer, whatever is to be found in the Articles relating to an appointment of that kind shall be taken to form part of the contract of appointment. The Court can compel the liquidator to repay the whole or part of any money which he has misapplied. One of the circumstances in which the repayment of part only should be ordered is where certain individuals have precluded themselves from claiming to participate in the amount misapplied: *In re Sunlight Incandescent Gas Lamp Co., Ld.* (2) As to accounts stated, there seems to be a distinction between a

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(1) Sect. 188: "(1.) Every liquidator appointed by a company in a voluntary winding up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice, and shall also advertise notice of the meeting once in the Gazette and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate.

"(2.) At the meeting to be held in pursuance of the foregoing provisions of this section the creditors shall determine whether an application shall be made to the court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting.

"(3.) On any such application the court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just."

(2) (1879) 11 Ch. D. 140, 143.

(3) (1875) 1 Ch. D. 130.

(4) (1874) L. R. 9 Ch. 557.

(5) [1891] 1 Ch. 717.

(6) [1903] 2 Ch. 625, 632.

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(1) Art. 157: "No director or other officer of the Company shall be liable for the acts, receipts, neglects, or faults of any other director or officer, or for joining in any receipt or other act for conformity, or for any loss or expense happening to the Company through the insufficiency or deficiency of title to any property acquired by order of the directors for or on behalf of the Company, or for the insufficiency or deficiency of any security in or upon which any of the moneys of the Company shall be invested, or for any loss or damage arising from the bankruptcy or insolvency or tortious act of any person with whom any money, securities, or effects shall be deposited, or for any loss occasioned by any error of judgment or oversight on his part, or for any other loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty."

(2) 16 Times L. R. 535.

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purely unilateral account and one where there are mutual debits and credits: *In re Laycock* v. *Pickles* (1); *Ashby* v. *James* (2); *Lemere* v. *Elliott.* (3)

Lionel Cohen K.C. in reply. It has been assumed throughout that the applicant's case was based solely upon the ground that the liquidator is under a statutory duty. The complaint is not only that the liquidator did not know of the statute, but also that he failed to place all the facts before his solicitors, and that he consulted them as to nothing except quantum. He had had no previous experience of marine insurance: *Home and Colonial Insurance Co., Ld.* v. *London Guarantee and Accident Co., Ld.* (4) There is no evidence of conduct on the part of the solicitors calculated to make the liquidator believe that further advice was unnecessary. Having regard to *In re Norske Lloyd Insurance Co., Ld.* (5), it was not competent to cease payment, whether it was desired to do so or not: *Eastern Carrying Insurance Co.* v. *National Benefit Life and Property Assurance Co., Ld.* (6); *Insurance Co. of North America* v. *North China Insurance Co.* (7) Under the Companies Act, 1928, where it is desired to include the liquidator, he is expressly included. It is extremely unlikely that any shareholder would contract with a liquidator, who is put in entire charge, that the liquidator shall be liable for nothing save deliberate dishonesty. The respondent is asking the Court to apply to the present case provisions and limitations which are not to be found anywhere within the Act. If there is an absolute statutory duty, the question whether there has been negligence is immaterial: *Groves* v. *Wimborne (Lord).* (8) If the liquidator has been negligent, it is unnecessary for the Court to decide whether the duty was or was not absolute: *In re London and Caledonian Marine Insurance Co.* (9) The dicta in that case and in *Knowles* v. *Scott* (10) must be read with regard to what the Court was considering. It was not

(1) (1863) 4 B. & S. 497.
(2) (1843) 11 M. & W. 542.
(3) (1861) 6 H. & N. 656.
(4) (1928) 45 Times L. R. 134.
(5) [1928] W. N. 99.
(6) 35 Times L. R. 292.
(7) 14 Times L. R. 334.
(8) [1898] 2 Q. B. 402.
(9) (1879) 11 Ch. D. 140.
(10) [1891] 1 Ch. 717.

considering the point which arises in the present case: *In re Anglo-Moravian Hungarian Junction Ry. Co. Ex parte Watkin* (1); *In re Oriental Inland Steam Co. Ex parte Scinde Ry. Co.* (2); *In re Paraguassu Steam Tramroad Co. Black & Co.'s Case* (3); *In re Windsor Steam Coal Co.* (1901), *Ld.* (4) A high standard of care is required from a liquidator, since, by accepting office, he undertakes duties for a reward: see Companies (Consolidation) Act, 1908, ss. 163, 170, as to contributories and their rights. The liquidator in the present case clearly has not fulfilled the statutory duty, whatever the measure of that duty may be. He took no advice as to the validity of the claim, and he took advice as to quantum only when dealing with the last small amount. If there is an absolute statutory duty, advice does not and cannot protect. In *In re Windsor Steam Coal Co.* (1901), *Ld.* (4), there was an absolute statutory duty, and the question whether advice had or had not been taken was therefore wholly irrelevant. That is the only case directly on the point, and it supports the contention that the liability is absolute: *Cavendish-Bentinck* v. *Fenn.* (5) The liquidator must be taken to know matters concerning the vested interests of individual contributories, and to know also that a majority cannot bind a minority. It is essential that a beneficiary be shown to have known the law before he can be alleged to have assented to, or to have concurred or acquiesced in, a breach of trust: *In re North Australian Territory Co. Archer's Case* (6); *In re Canadian Land Reclaiming and Colonizing Co. Coventry and Dixon's Case* (7); *Whitwam* v. *Watkin.* (8) A meeting of contributories could not authorize a liquidator to pay this debt. It is for them to decide what they will do with that to which they are entitled. It is the duty of the liquidator and the contributories, or of the manager, to know or to discover the law. The Court should order that compensation be paid to the contributories, and should leave questions as to the impounding of rights to be litigated between the liquidator and the individual contributory. That course does not deprive the liquidator of any right which he may have against a contributory: *Cockerell* v. *Cholmeley.* (1) It must be proved that a creditor knew the law, and his rights under the statute, before the Court can order that his interest be impounded.

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(1) 1 Ch. D. 130, 133.
(2) L. R. 9 Ch. 557, 559.
(3) (1872) L. R. 8 Ch. 254, 262.
(4) [1928] Ch. 609.
(5) (1887) 12 App. Cas. 652, 669.
(6) [1892] 1 Ch. 322, 334.
(7) (1880) 14 Ch. D. 660, 673.
(8) (1898) 78 L. T. 188.

Greene K.C. on the question as to account stated. The effect of the account stated is that there is a debt owing to the London Guarantee Company; that company will absorb all the assets, and will be entitled to receive dividends up to 20*s.* in the £. It is assumed that it would be possible to show an account stated up to 54,000*l.*, as at the end of 1921. If that were the amount, the position would be that the liquidator would have to pay to the creditors a further amount of about 4*s.* in the £. The question to be decided is whether, as to part of the sum of 89,100*l.* and the account stated, it can be established, with regard to the underwriting of 1918, that the account shows a balance. It is a well known practice in this class of case for the ceding company to retain a certain number of premiums. In the present case, it is clear that the acknowledgment of the accounts was meant to be an agreement that the account was correct. The only question is as to the effect of the account in law. Instructions to investigate the amount do not suggest any repudiation. Something much more definite would be required as evidence of intention to repudiate. Where there is acknowledgment of a debt due—being an actual agreement and acknowledgment of the balance—there is all that is required to make an account stated. There are two classes of transaction known to the law as accounts stated. One is where an acknowledgment is given of an actual or supposed debt. As the transaction is unilateral, the effect of the acknowledgment is twofold: it may be a mere admission; or the law may imply an undertaking to pay. Strictly speaking, that is not an account stated. In such a case, the alleged debtor can always go behind it to prove that there never was a debt. The true class of case—an insimul computassent—is where there are mutual items. The parties agree an account in which those items are set off against one another, and agree also the balance. There arises a new contract by the person in debit to pay the balance, the consideration being the mutual dealings with the items which are taken to have been paid. Such a contract is clearly invalid if there is fraud, or if there is illegality in the sense that items brought into the account are in respect of illegal transactions. But accounts stated in regard to voidable transactions are not in any way invalidated. There can be a perfectly good account stated in which the items are mere debts of honour. Neither in principle nor in authority is there any justification for the Court's going behind it. Thus, in the agreement of the mutual items and the notional payment of them, there is a new contract to pay. But the question whether the marine insurance contract is illegal or void is important and vital. The requirements of the Marine Insurance Act are somewhat wider than those of the Stamp Act. As to the admissibility of such a class of policy in evidence, see *In re National Benefit Assurance Co. Ex parte English Insurance Co.* (1); *English Insurance Co.* v. *National Benefit Assurance Co. (Official Receiver).* (2) The observations in that case do not preclude the Court from holding the policy to be not invalid but merely inadmissible in evidence. If it is made inadmissible in evidence the Revenue authorities are protected. That is the purpose of the provision avoiding marine insurance if it is not in a marine insurance policy. The object, from the point of view of the Revenue authorities, is to prevent the conclusion of contracts which will not attract stamps. The penalty imposed is imposed merely for Revenue purposes. It does not make the contract illegal. The chief distinction between a void and an illegal contract is that the benefit of an illegal transaction cannot be obtained directly or indirectly: *Attorney-General* v. *Forsikringsaktieselskabet National of Copenhagen* (3); *In re Laycock* v. *Pickles* (4);

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(1) (1830) 1 Russ. & My. 418; (1832) 1 Cl. & F. 60.

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(1) [1928] Ch. 74, 82.
(2) [1929] A. C. 114, 119.
(3) 40 Times L. R. 639, 641.
(4) 4 B. & S. 497, 506.

Camillo Tank Steamship Co. v. *Alexandria Engineering Works* (1); *Cocking* v. *Ward* (2); *Ashby* v. *James* (3); *Rose* v. *Savory* (4); *Owens* v. *Denton.* (5) There is nothing in the Stamp Act which invalidates accounts stated: *Joseph Evans & Co., Ld.* v. *Heathcote.* (6) The principle that the contract is not to be valid makes the contract a contract of imperfect obligation, i.e., it can be enforced. But to avoid it does not make it illegal, nor does the imposition of a penalty by a Revenue provision.

Lionel Cohen K.C. in reply on the question as to account stated. The documents relied on as accounts stated do not constitute accounts stated. Had a claim upon an account stated been available, it would not have been so against the liquidator. An account stated cannot be constituted by accepting delivery of and retaining an account. A distinction is intended between (i.) a unilateral account, which is a mere admission, and (ii.) an insimul computassent. There must be evidence of a complete discharge. The case of *Camillo Tank Steamship Co.* v. *Alexandria Engineering Works* (1) is an approval by the House of Lords of the principle that, where a contract is illegal or void, it is open to go behind an account stated: *Owens* v. *Denton.* (7) It cannot be the case that wherever money is receivable there is a proper foundation for an account stated.

Cur. adv. vult.

July 31. MAUGHAM J. [having stated the facts :] The above outline of the facts will need to be supplemented on a number of matters; but it seems desirable in the first place to point out the grounds on which the proof of the London Guarantee Company should have been (as presented) wholly rejected. Policies of sea insurance have to bear a stamp dependent on the amount of the sum insured. The term "policy of insurance" is defined in s. 91 of the Stamp Act, 1891, so as to include every writing whereby any contract of insurance is agreed to be made or is evidenced. By s. 92 the expression "policy of sea insurance" is expressly stated to include reinsurance. By s. 93 of the Stamp Act, 1891, it is provided as follows: "(1.) A contract for sea insurance (other than such insurance as is referred to in the Fifty-fifth Section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (2.) No policy of sea insurance made for time shall be made for any time exceeding twelve months. (3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

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(1) (1921) 38 Times L. R. 134.
(2) (1845) 1 C. B. 858.
(3) 11 M. & W. 542.
(4) (1835) 2 Bing. N. C. 145.
(5) (1835) 5 Tyrwh. 359, 360; 1 C. M. & R. 711, 712.
(6) [1918] 1 K. B. 418, 430.
(7) 1 C. M. & R. 711, 712.

The Marine Insurance Act, 1906, contains the following provisions: "Sect. 4: (1.) Every contract of marine insurance by way of gaming or wagering is void. (2.) A contract of marine insurance is deemed to be a gaming or wagering contract: (*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or (*b*) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any like term. Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer. Sect. 22: Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards. Sect. 23: A marine policy must specify: (1.) The name of the assured or of some person who effects the insurance on his behalf; (2.) the subject-matter insured and the risk insured against; (3.) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4.) the sum or sums insured; (5.) the name or names of the insurers." There can therefore be no doubt at all that if the London Guarantee Company was putting forward a claim for losses under the participation agreement, treating it as a contract of marine insurance, the claim was unsustainable on the ground that the agreement did not contain any of the particulars specified in s. 93 of the Stamp Act, 1891, and in s. 23 of the Marine Insurance Act, 1906. This was not therefore a stamp objection which might be cured on payment of a penalty, nor was the point a recondite one, since the provisions were contained in two modern Acts of Parliament. The only possible question would have been whether the participation agreement was a contract for reinsurance of a portion of the marine risks undertaken by the London Guarantee Company. On this question I venture to think no lawyer could entertain a serious doubt. In the liquidation of the National Benefit Assurance Company the claim of the English Insurance Company, Ld., on a participation agreement very similar to the one before me was disputed by the official receiver on the grounds furnished by the sections I have repeated. The matter came first before Eve J. in May, 1927, then before the Court of Appeal, Lord Hanworth M.R. and Sargant and Lawrence L.JJ., in October, 1927, and finally before the House of Lords, Lord Hailsham L.C. and Lords Sumner and Atkin, in July, 1928. (1) Throughout, the point raised was whether the participation agreement was not on its true construction an agreement for a partnership or joint adventure. No judge could be found to intimate any doubt on the matter. Nor, I may add, is it clear that, even if it was a partnership, the provisions of the Stamp Act had been complied with (see the speech of Lord Sumner). On the main point, however, I have a difficulty in seeing how the participation agreement differs from any ordinary contract or treaty for reinsurance; and if that be the case it was beyond question invalid. Scrutton L.J. in the year 1924 had taken occasion to remind the insurance world of the fact that marine reinsurance treaties in their usual form cannot be sued on: *Attorney-*

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(1) [1929] A. C. 114, 123, 124.

General v. *Forsikringsaktieselskabet National of Copenhagen.* (1) It cannot then be doubted that lawyers as well as laymen versed in matters of marine insurance were well aware of the point. Unhappily the liquidator, who is an able and experienced chartered accountant, had had practically no experience in or contact with marine insurance matters. He was quite unaware of the sections I have referred to. He did not know, nor did he inquire, whether any policies had been issued in regard to the reinsurance under the participation agreement. He took no direct advice on the question of the validity of the claim from either solicitor or counsel. He was quite unaware that any point of law was involved. In complete good faith and apparently without any misgiving he allowed the proof of the London Guarantee Company, whereas he should have rejected it.

The claim on the present summons is supported on alternative grounds. First it is said that the duty of the liquidator in a voluntary liquidation to pay creditors and to distribute the surplus assets is a statutory duty which, apart from negligence, is broken by paying moneys to persons who have no legal claim. Secondly, and in the alternative, it is contended that in the circumstances of the present case the liquidator was in fact guilty of negligence in admitting so large a proof in such a case, without legal advice and without the approval of the Court.

For the respondent a number of points are raised. First, the main proposition is wholly disputed. Secondly, on the facts to be mentioned later it is denied that the liquidator was guilty of negligence. Thirdly, art. 157 of the Articles of Association is relied on. Fourthly, it is contended that even if the whole claim ought not to have been allowed, yet the London Guarantee Company could have sustained a valid claim under an account stated for 54,684*l.* And finally it is urged that the present application is made under the summary jurisdiction of the Court conferred by s. 215 of the Companies Act, and that the Court has a discretion as to the "compensation" which should be allowed, a discretion which, in the special circumstances of the present case, ought to be exercised in favour of the liquidator. I should add that further defences based on ss. 30 and 61 of the Trustee Act, 1925, are, perhaps with some optimism, reserved for the consideration of the House of Lords. Before dealing with these points I think it will be desirable to state the further facts which are relied on by the respondent on the question of negligence. Shortly after the incorporation of the company the respondent's firm had been appointed to act as the auditors, and the respondent in that capacity had obtained a general knowledge of the company's affairs and in particular of the course of business in relation to the participation agreement. Before the passing of the extraordinary resolution to wind up, negotiations had proceeded between Mr. Walrond as chairman of the company, on the one hand, and the London Guarantee Company on the other, with the object of finding a scheme by which the winding up might be avoided. During the autumn of 1921 these negotiations were continued on behalf of the company by the respondent at the request of the directors. No suggestion was made to him that the claims of the London Guarantee Company were in any respect invalid, and that there was from a legal point of view no reason for a liquidation, since by repudiating such claims the company would become perfectly solvent. The negotiations, however, broke down, and in August, 1922, it was intimated by letter that the London Guarantee Company would prefer the company to be wound up, and the necessary resolution was passed on October 3. On October 18 the first meeting of creditors was held under s. 188 of the Companies Act, and at this meeting the respondent as liquidator pointed out that the insolvency of the company was caused by the participation agreement, and that the losses under that agreement would amount to something like 87,000*l.* He also pointed out that included in the assets of the company was a sum of some 15,000*l.* due by the General Produce Insurance Company, Ld., under another participating agreement. The approximate statement of affairs showed total unsecured creditors of 92,000*l.*, of which the bulk consisted of the claim of the London Guarantee Company. The alleged creditors present were three in number—namely, Mr. Walrond, who had a claim for director's fees; Mr. Butcher, who represented the London Guarantee Company; and Mr. Frank Marrian, another member of the firm of Harris, Marrian & Co., who was supposed to have a claim for commission under the management agreement above referred to.

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(1) 40 Times L. R. 639, 641.

On May 2, 1924, there was a contributories' meeting, at which six persons were present, who held between them about half of the issued shares of the company. At this meeting the liquidator stated that the chief creditor was the London Guarantee Company, whose claim under the participation agreement in respect of losses amounted at December 31, 1923, to 83,945*l.*, subject to further claims yet to come in. On September 17, 1925, a further meeting of contributories was held. The liquidator explained the position. He stated that he had collected by means of calls some 5600*l.*, and that claims in the liquidation had been admitted totalling 93,305*l.* He had paid dividends on the claims of unsecured creditors of 3*s.*, 2*s.* and 1*s.*, making a total of 6*s.* in the £. He had entered into an agreement with the General Produce Insurance Company, Ld., compromising their debt (so called) of 16,090*l.* at 11,625*l.*, and he had received 3000*l.* on account. The final meeting of the contributories was held on May 31, 1927. Four persons were present. The respondent submitted his final accounts, which were approved by the meeting, and he reported that the claim of the London Guarantee Company had involved lengthy investigations of accounts and protracted negotiations. The contributories voted to him at this meeting the balance of his remuneration. It may be observed here that not one of the contributories at any time suggested to the liquidator any doubt as to the validity of the claim of the London Guarantee Company, though some of them were persons experienced in the business of marine insurance.

The General Produce Insurance Company had entered into a participation agreement with the company under an agreement dated May 21, 1918, whereby the company ceded to the General Produce Insurance Company one-fifth of its risks under the participation agreement of January 30, 1918, with the London Guarantee Company subject to the like terms and conditions as were contained in that agreement. Claims under this agreement were of course open to the same objections as have been pointed out in regard to claims under the original participation agreement, but no point of this kind was ever raised by or on behalf of the General Produce Insurance Company. That company, however, was not in liquidation. After some negotiations by the liquidator with a view to ascertaining or settling the amount payable by the General Produce Insurance Company, a compromise agreement was entered into on July 24, 1925, providing in substance for the payment by instalments by the General Produce Insurance Company of a sum amounting to 11,625*l.* It should be added that the substance of this compromise had been brought before the registrar on a summons supported by two affidavits made by the liquidator in which express reference was made to the participation agreements. By an order of the registrar dated June 22, 1925, it was ordered that the liquidator be at liberty to release the General Produce Insurance Company "from their present liability" to the company upon the General Produce Insurance Company making the payments contemplated by the proposed compromise agreement, but in default of payment of any one instalment what was described as the "present liability" of the General Produce Insurance Company was to continue. No question was raised before the registrar as to the validity of the claim against the General Produce Insurance Company, and the only question submitted to him was one relating to the amount of the sum payable under the compromise.

There was another incident of the same nature. On March 1, 1919, the company had entered into what is described as an "excess reinsurance contract" with the Sterling Offices, Ld., on behalf of the Essex Union Company, Ld., the Norske Lloyd Insurance Company, and the London Guarantee Company. The contract covered vessels despatched on and after January 1, 1919, and before December 31, 1919, and it was subsequently extended to cover the year 1920. Claims under this contract against the company were open to the same objection of invalidity. Nevertheless no question of that kind was raised. In October, 1922, the accounts were made up and they showed that the company then owed in respect of this contract some 250*l.* A compromise was suggested by Mr. Van der Linde, the liquidator of the Norske Lloyd Company and a joint liquidator of the Essex Union. The respondent liquidator provisionally agreed to admit proofs of debt of the three companies at the sum of 100*l.* each upon the terms that they should have no further claim against the company. This compromise was subject to the sanction of the Court, which was applied for by originating summons dated July 4, 1923, supported by two affidavits of the liquidator, one of which exhibited the excess reinsurance contract. The registrar by order dated August 3, 1923, gave the liquidator liberty to admit proofs of debt on the terms suggested. The only point raised before the registrar was again the question of quantum.

In January, 1927, the liquidator was anxious to pay a final dividend to the creditors, and accordingly arrived at a provisional compromise with the London Guarantee Company by which their claim, which by that date amounted to 88,761*l.*, was to be definitely fixed at 89,100*l.* By a letter of January 25, 1927, to the solicitors acting for the respondent liquidator in the winding-up, the liquidator informed the solicitors of the facts and requested them to arrange for the consideration of the matter by the Court with a view to the approval of the proposed compromise. By letter of January 26, 1927, these gentlemen informed the liquidator that they did not consider it necessary in the circumstances to obtain the Court's approval to the addition of the sum of 238*l.* 13*s.* to the amount already agreed of 88,761*l.*, and stated that as liquidator he had full power to compromise the claim. Accordingly the liquidator abstained from obtaining the approval of the Court in this matter. The solicitors acting for the liquidator in the winding up in all these transactions were no doubt aware that the liquidation was being caused by reason of claims under marine reinsurance treaties, and that the liquidator was himself claiming against the General Produce Insurance Company for sums due under a marine reinsurance treaty. They never suggested to the liquidator that there was any doubt as to the validity of claims under such treaties. On the other hand they were never asked to consider the question nor whether the proof of the London Guarantee Company was a valid one nor whether there was any ground on which it could be disputed. The liquidator in fact never told his solicitor that no policies had been issued in connection with any of these matters. His own phrase in cross-examination before me is this: "The two of us," that is to say he and his solicitor, "always talked together as though there was no question of validity or invalidity." There was no question raised with regard to the policies. He says: "My mind was a blank in regard to the policies and no consideration turned upon the policies in my mind." In giving evidence in the action before Wright J. he candidly stated that he would have paid the claim of the London Guarantee Company whether there were policies or not.

The question as to the liability of a liquidator who has without negligence allowed the proof of a person who has no legal claim was left open by the Court of Appeal in the recent case of *In re Windsor Steam Coal Co.* (1901), *Ld.* (1) That case was one in which negligence in the liquidator had been clearly established, so that it was not necessary to decide the legal question; but the observations of the learned judges certainly do not encourage the proposition that the liquidator is a mere agent liable only if negligence of a gross kind is established. I should hesitate a long while before deciding that a voluntary liquidator is personally liable, if notwithstanding every care on his part he admits a proof which is ill-founded. The statutory duties cast upon him involve the getting in of the property and applying such property in satisfaction of the liabilities pari passu, and subject thereto the distribution of the balance among the members. The liquidator may exercise the powers of the Court of settling a list of contributories and of making calls, and he must pay the debts of the company and adjust the rights of the contributories: see s. 186 of the Companies (Consolidation) Act, 1908. The Winding-up Rules recognize that the liquidator, who has to examine every proof of debt lodged with him and the grounds of the debt, may be wrong; and provision is made for an appeal to the Court, who may reverse or vary the liquidator's decision. The claim of a creditor may be based upon disputable matters of fact, as well as difficult questions of law. Moreover the duty of getting in the property of the company cannot be an absolute duty, since such property may be irrecoverable. I do not therefore accept the view that the liquidator in the matter of admitting proofs is practically in the same position as an insurer so that, in any event, and under all circumstances, he is liable if a debt is subsequently shown to have been wrongly admitted.

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(1) [1929] 1 Ch. 151.

On the other hand I think there can be no doubt that, in the circumstances of the case, a high standard of care and diligence is required from a liquidator in a voluntary winding up. He is of course paid for his services; he is able to obtain wherever it is expedient the assistance of solicitors and counsel; and, which is a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the Court, and to obtain its guidance. Now it is well known that the business of marine insurance in this country is regulated by Acts of Parliament and is of a highly technical character, and those who have any practical acquaintance with the business as carried on in London are well aware that in certain respects the statutory provisions relating to marine insurance are disregarded. The participation agreement itself suggests the fact. The practice of granting P.P.I. policies without regard to the provisions of the Marine Insurance Acts is notorious. And there are other methods in use by underwriters which are known to result in obligations only enforceable on moral grounds. I have come to the conclusion that having regard to the magnitude of the claim, in addition to the considerations I have mentioned, it was the duty of the liquidator carefully to investigate the validity of the proof put in by the London Guarantee Company. This duty he did not discharge, and I do not think he can wholly escape liability by pointing out that other persons—the contributories, the creditors, his solicitors and other persons with whom he came into contact during the liquidation—failed to give him a warning. He chose to navigate in these narrow seas, to him unaccustomed and unknown, without either chart or pilot; and for this temerarious conduct he must bear the responsibility.

I will now deal with the special defence under art. 157 of the Articles of Association of the company, a matter which can I think be disposed of briefly. It is well settled that the Articles of a company do not and indeed cannot constitute a contract between the company and the directors or other officers of the company. In the case of a director it is no doubt easy on the facts as they generally exist to infer an agreement between him and the company that he will serve on the terms of the Articles. In the present case there is no evidence whatever that the respondent was appointed to be liquidator on the condition that art. 157 should apply; and I should not readily infer that shareholders would be desirous of appointing a paid liquidator on the terms that, provided only that he is honest, he is not to be liable for the grossest negligence, idleness, or incapacity. It becomes therefore unnecessary to determine the question whether a liquidator comes within the words "other officer of the Company" used in the Article. I doubt it. Arts. 156 and 157 are, I think, to be construed together, and they seem to relate to the duties and liabilities of directors and other officers whilst the company is a going concern. (1) Moreover it seems hardly possible that art. 157 can afford any protection to a liquidator in proceedings for the benefit of creditors of the company, since the liquidator has a statutory duty towards them which the Article cannot affect; and this forms an additional reason for not extending the Article to the acts of a liquidator.

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(1) Art. 156: "Every director, manager, secretary and other officer or servant of the Company shall be indemnified by the Company against and it shall be the duty of the directors out of the funds of the Company to pay all costs, losses, and expenses which any such officer or

I will deal next with the contention (added by amendment after the case had been opened) that the London Guarantee Company could in any event have put in a valid proof for the sum of 54,684*l.* on an account stated. In the final conclusion at which I have arrived, this question has no practical importance; but since the case may go further, I think it right to express my opinion upon it. The question whether there was such an account stated is itself not free from difficulty. The London Guarantee Company forwarded quarterly statements of account under the participation agreement to the company and requested the company to confirm the accounts and to remit a cheque for the amount due. The company in acknowledging the statements stated that they "noted the figures" for which they were "obliged," but they did not in terms confirm the accounts. They did, however, enter the precise substance of the accounts in their books. At the end of the year 1921 the amount claimed by the London Guarantee Company as owing by the company was the sum of 54,684*l.* 12*s.* 5*d.*, and this balance was accepted as correct by the company in the sense that it was entered in their books as a credit to the London Guarantee Company. So far there is, I think, no account stated between the parties; but by a letter dated July 28, 1928, written by Messrs. Carnaby, Harrower, Barham & Co. (the liquidator's firm) to Messrs. Gardiner & Co., the solicitors to the London Guarantee Company (with the express authority of

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servant may incur or become liable to by reason of any contract entered into or act or deed done by him as such officer or servant or in any way in the discharge of his duties. The directors may execute, in the name or on behalf of the Company, in favour of any director or other person who may incur, or be about to incur, any personal liability for the benefit of the Company, such mortgages of the Company's property (present and future) as they may think fit, and any such mortgage may contain a power of sale, and such other powers, covenants, and provisions, as shall be agreed on."

Messrs. Harris, Marrian & Co., the managers of the company), it was stated that at December 31, 1921, the outstanding liabilities of the company to the London Guarantee Company were approximately 60,000*l.*, "including 54,684*l.*" due to the London Guarantee Company. This letter was, in my opinion, binding on the company, and I think, in view of the circumstances, that it has the effect of causing the accounts rendered in respect of the period up to December 31 to be an account stated. Accordingly if such an account can form a valid cause of action, even though all the items are disputable, it may be that the London Guarantee Company could have proved for the sum in question; and I will proceed to consider whether on the assumption that there was such an account stated the sections of the Stamp Act and the Marine Insurance Act do not preclude any claim upon that basis.

The first thing to be determined is the nature of the invalidity arising from the provisions of s. 93 of the Stamp Act. But for the provisions of s. 91, sub-s. 1 (*a*), of the Marine Insurance Act, 1906, that nothing in that Act should affect the provisions of the Stamp Act, 1891, I should be disposed to hold that the provision of s. 22 of the Marine Insurance Act amounted to a statutory interpretation of s. 93 of the Stamp Act, so that in substance the invalidity of a contract for sea insurance not expressed in a policy was no more than an invalidity as regards admissibility in evidence. On consideration I think that s. 91 of the later Act precludes me from coming to such a conclusion, and that I am bound to construe s. 93 of the Stamp Act without regard to the provisions of the later Act. On that footing I must hold that the provision of s. 93 of the Stamp Act, 1891 (that a contract for sea insurance shall not be valid unless the same is expressed in a policy of sea insurance), having regard to the various penalties imposed by s. 97 of the Act, is tantamount to a provision that such a contract shall be null and void. It would have been easy, if desired, to have adopted the language used in s. 14, sub-s. 4, of the Act, and to have provided that the contract should not in any civil proceedings "be given in evidence or be available for any purpose whatever." It seems to have been thought that nothing short of a provision that a contract for sea insurance should be invalid unless expressed in a policy, would be a sufficient protection of the Revenue. Not only is the contract invalid, but the assurer who takes credit in an account for any premium for any sea insurance or who takes upon himself any risk unless the insurance is expressed in a policy, is guilty of an "offence" for which he incurs a penalty. The broker or agent concerned in the matter has no legal claim to any charge for brokerage or commission, and any money paid to him in respect of such charge remains the property of his employer: see s. 97, sub-ss. 1 and 2. It seems to follow that each entry on each side of the account delivered by the London Guarantee Company to the company under the participation agreement was an entry in respect of an offence within the Act. It is no doubt well settled that where "there is a real account stated, called in old law an insimul computassent, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck"—I am using the language of Blackburn J. in the well known case of *In re Laycock* v. *Pickles* (1)—"the consideration for the payment of the balance is the discharge of the items on each side." Blackburn J. adds: "It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary in order to make out a real account stated, that the debts should be debts in praesenti, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient." It is contended on behalf of the respondent that there was here a clear moral obligation on each side, and that this brings the case within the statement of Blackburn J., even if the participation agreement was wholly null and void. I do not think it necessary to go through and comment on all the cases that were cited to me on this topic, for I am content to follow the observations of the Court of Appeal in the case of *Joseph Evans & Co., Ld.* v. *Heathcote.* (1) It is true that on the facts in that case, the Court held that the plaintiffs were entitled to recover upon an account stated; but the learned judges in order to arrive at that conclusion considered it necessary to examine the question whether the agreement between the parties was void or whether it was only such a contract that it could not be directly enforced. Pickford L.J. expressly says: "I do not think that, where a contract from its nature can give rise to no valid claim, a claim upon it can be used to found an action upon an account stated." This dictum is exactly in point. Bankes L.J. comes to this conclusion (2): "The position of the agreement sued on, therefore, under these Acts, is that it is neither void nor voidable, and there is nothing in the Act which prevents the Court from accepting the debt created under the agreement as a proper foundation for an account stated." Scrutton L.J. cites with approval a passage from the judgment of Tindal C.J. in *Cocking* v. *Ward* (3) in the following terms: "The principle may not perhaps be applicable to cases where it can be shown that the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute as by those against usury or gaming, but we think it applies to cases where the only objection is that the original debt might not have been recoverable from the deficiency of legal evidence to support it," and Scrutton L.J. then goes on to point out that since 1871 a contract in restraint of trade between members of a trade union is no longer void but is not directly enforceable. I conclude from these observations that where an agreement is wholly void and a fortiori where the entry into it or the taking credit in account in respect of it is an "offence," items alleged to be due under such an agreement cannot properly be used to found an action on an account stated. Moreover in the present case there is another serious objection to the claim on an account stated based upon the special position of a liquidator. It is settled law that no judgment recovered against a bankrupt and no account stated with him can deprive the trustee in bankruptcy of his right to investigate the nature and grounds of the claim made against the bankrupt's estate: *In re Van Laun.* (1) Rule 103 of the Winding-up Rules of 1909 is practically identical with r. 22 in the Second Schedule to the Bankruptcy Act, 1883, which was relied on by the Court of Appeal in that case. I am of opinion that the position of a liquidator, when examining a proof for the purpose of admitting it or rejecting it in a winding up, is for this purpose exactly the same as that of a trustee in bankruptcy. The result is that on this ground also I think a proof based on the suggested account stated ought to have been rejected.

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(1) 4 B. & S. 497, 506.

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(1) [1918] 1 K. B. 418, 427.
(2) [1918] 1 K. B. 418, 432.
(3) 1 C. B. 858.

The respondent is therefore in my judgment liable as for misfeasance in the terms of s. 215 (2); and the last and in my view the most important question that arises is as to the amount which he should be ordered to repay or to contribute "by way of compensation" in respect of the misapplication of the money of the company. The section replaces with modifications, unimportant in the present case, s. 10 of the Companies (Winding-up) Act, 1890, which in turn replaced s. 165 of the Companies Act, 1862. It gives a summary jurisdiction against delinquent directors and officers; the Court may "examine into their conduct" and compel them to repay moneys misapplied or retained or for which they are liable with interest "after such rate as the Court thinks just," or "to contribute such sums of money to the assets of the company by way of compensation . . . . as the Court thinks just." The question is whether the amount of compensation is (at least to some extent) a matter for the discretion of the Court. It is clear I think that the language is carefully chosen. It would have been much simpler to provide, if that had been the intention, that the officer should pay such damages as the company or its contributories shall have sustained. The Act gives after winding up new rights which did not exist before winding up; but the section creates no new rights, though it gives power to enforce the new rights created by the winding up: see *In re National Funds Assurance Co.* (1); *Cavendish-Bentinck* v. *Fenn.* (2) On the other hand, the section does give a summary remedy of a special kind in cases of breach of trust or misfeasance by an officer, and its special character is illustrated by the circumstance that the section requires the Court to examine into the conduct of the person attacked and by the fact that no set-off or cross-claim against the company is allowed: *Ex parte Pelly.* (3) The result of this of course is that the amount becoming due under the section has to be paid in full, whilst a valid claim by the officer in question against the company can only be the subject of proof. It may be added that the respondent is not entitled to security for costs, as he would be in an action by an insolvent company, nor is he entitled to discovery in the ordinary way. On the whole I think, and I am supported by the authority of the late Wright J., that the exceptionally able draftsman of the Companies Act, 1862, had in mind the possibility that circumstances might arise which would make

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(1) [1907] 2 K. B. 23.

(2) Sect. 215: "(1.) Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

"(2.) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

"(3.) Where in the case of a winding-up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (*g*) of sub-section (1.) of section four of the Bankruptcy Act, 1883.

"(4.) So much of this section as refers to promoters, and to property of a company other than money, shall not apply to a winding-up in Scotland or Ireland."

(1) (1878) 10 Ch. D. 118, 125. (2) 12 App. Cas. 652.
(3) (1882) 21 Ch. D. 492.

it unjust and inequitable to require payment of the total amount which the company might perhaps recover in an action against the director or other officer concerned. In the present case it must be admitted that creditors of the company have a contractual right to be paid the amount of their debts; and it is difficult to see how, apart from a personal estoppel which has not been established, the respondent, having wrongly paid away large sums out of the available assets, can resist an order which will enable the lawful creditors to be paid in full, even though the claims of some of them may not be of a meritorious character. Such creditors would in my opinion have a right to obtain leave to sue in the name of the company to recover from the liquidator an amount equal to the amount of their debts not yet discharged; and he could not defend himself by urging that some of them should have warned him of the risks he was running in not investigating the legal validity of claims under a Marine Reinsurance Treaty. There was, I think, no duty of that kind cast upon the creditors. But the position of the shareholders of the company seems to me to be widely different. They must be taken to have been aware that the business of the company in the main was that of Marine Reinsurance under what was described as a participation agreement. The facts were disclosed in the annual reports and at the general meetings held on March 21, 1918, and on April 7, 1919. Profits were earned under this agreement and the company's position was thought to be excellent till the general meeting of May 7, 1920, when the chairman pointed out that the recent figures rendered by the London Guarantee Company were extremely unsatisfactory. The agreement itself, which of course had been approved by directors elected by the shareholders, points clearly to the fact that the business involved was based on honourable understanding, not on legal obligation. The arbitration clause, as I have indicated, directs the arbitrators to turn a blind eye to the law. I do not think I should be justified in drawing the inference that the directors and shareholders as a whole were entirely ignorant of the relevant provisions of the Stamp Act and the Marine Insurance Act. The probability is, and since not one of them was called as a witness the matter rests on probability, that like most persons engaged or concerned in Marine Insurance business they knew there were some sections in the Acts of Parliament regarded by underwriters as obnoxious, and that they were content to ignore them. In any case I am bound I think to treat the directors and shareholders alike as being not ignorant of the law, but as persons who, to use Lord Atkin's graphic phrase, were "outlaws moving outside the pale": *English Insurance Co.* v. *National Benefit Assurance Co.* (*Official Receiver*). (1) Having so carried on business during the years 1918, 1919, and 1920, the shareholders found themselves liable in honour to pay, out of and to the full extent of their assets, to the London Guarantee Company, sums exceeding 72,000*l.*, with a certainty that when all claims against that company had been investigated the total amount due would largely exceed that sum. If the directors or the managers had sought to repudiate this claim they could never, in the Marine Insurance world, have held up their heads again. I do not know whether there were any shareholders who, if the matter had been fully explained to them before the liquidation, would have voted for repudiation. I am convinced that the large majority would have preferred the honourable course. At any rate the shareholders approved the course taken by their chairman and manager, Mr. Walrond, in negotiating for a settlement with the London Guarantee Company; and when such negotiations failed the shareholders who attended the meeting of October 3, 1922, passed a unanimous vote in favour of an extraordinary resolution to wind up. If the company could not by reason of its liabilities continue to carry on business, it was because, and only because, the liability in honour to the London Guarantee Company was being treated as binding. On any other footing the company was more than solvent. Liquidation was only necessary as an expedient for satisfying this

(1) [1929] A. C. 114, 126.

liability pari passu with the others so far as the assets of the company could extend. In effect, the passing of the resolution amounted to a mandate from the shareholders to the liquidator to treat the claim of the London Guarantee Company as valid. It is, however, urged that the liquidator, who has paid large dividends to the London Guarantee Company as having a valid claim, ought to repay the whole amount, with the result that not only will creditors be paid in full, but that shareholders will receive considerably more than par in respect of their shares. But the directors and managers and shareholders have had all the satisfaction, and I should imagine all the advantages, of having acted honourably up to the date of the resolution to wind up. It would seem unlikely that persons, who would have scouted the notion of not keeping faith as reinsurers of risks deliberately undertaken, can see no objection to making a liquidator liable for having, though in ignorance, acted honestly on their behalf. A claim on that footing is one which the Court ought not to regard with favour.

It is urged that the shareholders might have obtained leave to sue the liquidator in the name of the company and that in such a proceeding the liquidator would have to account for the whole of the dividends wrongly paid. I doubt whether the premise is sound. It must be remembered that before liquidation a shareholder has no right against the company to receive the value of his shares, and that in a liquidation his right is only a right to receive a dividend in the surplus assets (if any) resulting from the winding up. His position is widely different from that of a creditor with a legal right against the company. If then a shareholder were to apply in such a case as the present, creditors having been paid in full, for leave to use the name of the company to sue the liquidator I conceive that, the facts having been disclosed, such an order might well be refused. However that may be I have only to deal with the present application under a section which in my view confers on the Court a discretion. The matter, as I have said, is not free from authority. A similar question came before Wright J. in the year 1900 in the case of *In re Sunlight Incandescent Gas Lamp Co., Ld.* (1) On that occasion it was sought to make two directors of the company, Mr. Duncan and Mr. Wethered, accountable for (1.) a sum of 420*l.* paid out of the assets of the company to Duncan as an underwriting premium on a policy of insurance, and (2.) a sum of 210*l.* paid out of the assets to Wethered as a like premium. The policy was one granted by both gentlemen to secure the company against the reversal of a judgment given in the Queen's Bench Division in an action brought by the company against the Incandescent Gaslight Company, Ld. Duncan and Wethered, being directors of the company, were clearly liable to account to the company for any profit made by them by virtue of this transaction. In the event, the Incandescent Company abandoned the appeal which they had lodged, and Duncan and Wethered became entitled to and received the premiums. No authority had been given by the shareholders of the company to the directors to enter into the transaction. On the other hand, the transaction was carried out in good faith and in the interests of the company. All the directors were aware of and fully concurred in what was done; and it appears to have been disclosed at a general meeting after the transaction was complete that Duncan and Wethered had given the insurance in question, though the amount of the premiums was not mentioned. In these circumstances, and all creditors having been paid, the learned judge had to determine whether on a misfeasance summons Duncan and Wethered could be made jointly and severally liable to repay the amount of the premiums with interest. He observed that all the shareholders with three exceptions repudiated the proceedings and had intimated that they did not desire to have the money repaid. He then continued as follows: "The exceptions were Mr. Morris, his son, and another shareholder who has transferred his shares. Under these circumstances, if there had been any unsatisfied creditors, and the present proceedings had been by action instead of summons, there might be no answer to the claim.

(1) 16 Times L. R. 535.

But the question arises upon a summons taken out under s. 10 of the Companies (Winding-up) Act, 1890. That section is carefully worded. It seems to me that that section gives a wide discretion to the Court, and I think that the discretion ought to be exercised in this case by not making an order for payment, having regard to the fact that most of the shareholders do not want the money and would return it, if paid to them, to these directors and that the other shareholders knew of what had been done. I think, therefore, that there ought to be no order in the present case. I cannot however give these directors their costs because they ought in my judgment to have made a more full and detailed disclosure. The liquidator will be entitled to take his costs out of the assets." This authority has never so far as I know been questioned, and I accept it as being based on a correct interpretation of the language of the misfeasance section. It is true that it can only be under very exceptional circumstances that the Court can be called upon to exercise its discretion in favour of an officer of a company in a case of wrongful misapplication or retention of money, misfeasance or breach of trust. But on the whole and after careful consideration of all the facts I think that such circumstances exist here. In my judgment the sum which the respondent ought in justice to contribute by way of compensation to the assets of the company is such an amount as will enable all the creditors of the company to be paid in full with interest at 5 per cent. If necessary there will be an inquiry as to this amount. The respondent must also pay the costs.

Solicitors: *William A. Crump & Son; Lawrence Jones & Co.; William Charles Crocker.*

K. R. A. H.

LUXMOORE J.

1929

July 10, 11, 12, 15, 16, 17, 18, 19, 29.

VANDERPANT *v.* MAYFAIR HOTEL COMPANY, LIMITED.

[1928. V. 561.]

Nuisance—Obstruction of Public Highway—Access to Private Dwelling-house—Private Resident's complaint as to Obstruction by Vehicles—Private and Public Rights—Attorney-General's Position—Nuisance by Noise from adjacent Property—What constitutes an actionable Nuisance by Noise—Claim for Injunction.

The defendant company built a large hotel, including a kitchen, close to the plaintiff's private residence and with windows overlooking the plaintiff's premises; and a hitherto quiet highway, with very little traffic passing over it, became a busy street with vehicles constantly coming and going in connection with the defendants' hotel business. These vehicles made use of a very small yard adjoining the plaintiff's house, opening into the street, and the roadway there became congested at times. In consequence, the plaintiff complained of nuisance: (*a*) by obstruction of access to his residence; (*b*) by depriving him of reasonable use of the public highway; (*c*) by noise proceeding from the defendant company's kitchen, and other noises caused by the hotel staff going off duty late at night:—

Held, on the result of the authorities, that a private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public.

Held, as regards the complaint of noise, that noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary plain and simple notions, and having regard to the locality; the question being one of degree in each case.

Injunction granted on this head; in the case of the noise from the kitchen in general terms, but, as regards the noise arising from the departure of the hotel staff, limited to the hours between 10 P.M. in the evening and 8 A.M. in the morning. The plaintiff having failed on the other issue, no costs.

ACTION.

The following statement of facts is substantially taken from the judgment of the learned judge, with some abridgment of the correspondence.

The plaintiff was the owner and occupier of the premises No. 62A Curzon Street, Mayfair, London, which he had occupied since 1919. The house was a private dwelling-house, being the last house on the north-east side of Curzon Street, and adjoined the site of the Mayfair Hotel, which belonged to the defendant company. Curzon Street at that end was a cul-de-sac so far as vehicular traffic was concerned, but there was an exit from it for foot passengers through Lansdowne passage into Berkeley Street. When the plaintiff first acquired his house, the site of the Mayfair Hotel was comprised in and formed part of the gardens of Devonshire House, and there was no exit from those gardens into Curzon Street. There was no doubt that at that time, and until building operations were begun on the Devonshire House site, the end of Curzon Street in which the plaintiff's house was situate was an exceptionally quiet and peaceful spot with but little traffic passing over it, though, like the rest of Curzon Street, it was, and remained, a public highway.

In or about June, 1926, the defendant company acquired a site on part of the Devonshire House garden, and erected thereon a large hotel—namely, the Mayfair Hotel. The hotel was so planned and erected that there was an entrance to it opening into a small yard of an area of approximately 220 square feet, which in its turn opened into Curzon Street. The entrance from Curzon Street into this yard was by a gate about 10 feet wide. This entrance was made with the approval and consent of the Westminster City Council as the Highway Authority within the said City under and by virtue of an agreement dated September 29, 1926, made between the Mayor, Aldermen and Councillors of the City of Westminster of the one part and the defendant company of the other part. The agreement provided by clause 1: "Conditionally upon the exact observance and performance by the licensee of the stipulations on the part of the licensee hereinafter contained the Council hereby agree to construct across the pavement of Curzon Street aforesaid a carriageway crossing having the dimensions and occupying the position shown on the plan hereto annexed being a crossing to give access for vehicles to the service yard of the property intended to be called 'The Mayfair Hotel.'" Clause 3: "The licensee covenants with the Council to use every endeavour to secure that the delivery or removal of goods by way of the crossing shall be confined to the early hours of the morning and further that the licensee will exercise the utmost care to prevent any undue noise arising from the use of the crossing to the detriment or inconvenience of adjoining residents." Clause 7 provided : "The Council may at any time on giving one calendar month's notice in writing to that effect to the licensee at the last known address of the licensee aforesaid and without any notice upon the licensee ceasing to be in occupation of the Mayfair Hotel remove the said crossing and the cost of such removal and of restoring and making good the said pavement and the adjoining carriageway and of all incidental works shall on demand be repaid by the licensee to the Council and the Council shall not be responsible for any injury or damage to the premises or goods of the licensee arising from any of the matters aforesaid."

By an earlier agreement dated March 30, 1926 (hereinafter more fully referred to in the judgment of the learned judge), and made between a Mr. A. O. Edwards, who was merely a trustee for the defendant company of the site for the then proposed hotel, of the one part, and the plaintiff of the other part, it was (inter alia) in effect agreed that the defendant company should not block up any of the windows in the eastern wall of No. 62A Curzon Street adjoining the site, and would only make use of so much of the wall as was necessary for the building then in course of erection on the site ; nor would they seek to acquire any rights of light over the site of No. 62A Curzon Street.

Before the agreement of September 29, 1926, was entered into and certainly afterwards, it appeared that the plaintiff from time to time complained of the obstruction caused to his house by the bringing of building and other materials to the hotel. The first complaint made by the plaintiff to the defendant company and adduced in evidence was contained in a letter dated January 11, 1927. It was addressed to the secretary of the defendant company, and it dealt exclusively with obstruction "of the front of this house by vehicles delivering goods to or removing same from the service entrance of the Mayfair Hotel in Curzon Street. I shall be obliged if you will see that the front of my house is not thus obstructed and also that the crossing to the service yard is used only in accordance with the terms of the agreement between the Westminster City Council and the Mayfair Hotel Company." On January 13 this was answered by the managing director of the defendant company, who promised to use every effort to cause as little nuisance as possible during the remainder of the deliveries of the furniture for the hotel, and added: "We hope to open the hotel by the end of March, and you may be quite sure that the agreement which I entered into on behalf of this Company with the Westminster City Council, which is operative when the hotel commences to run, will be observed so far as possible both in the letter and in the spirit." The plaintiff wrote again to the managing director on March 24, 1927, and complained that in fact there had been continual obstruction by vehicles serving the hotel, and threatened to take action if the obstruction continued after the opening of the hotel. That letter was answered on the same day by the managing director of the defendant company by a letter in which he said: "I have your letter of even date. It is a source of great regret to me that you feel you have cause for complaint, but I do not think you can realise the magnitude of our enterprise and the difficulties we have had to cope with in equipping and furnishing an hotel of this size. . . . When we are finally opened, as we shall be at the end of this week, I feel sure you will have no reasonable cause for complaint," adding renewed expressions of regret and promise of endeavour to avoid annoyance.

The hotel was opened for business on March 28, 1927, and on April 28, 1927, the plaintiff again wrote to Sir Francis Towle, the managing director. The letter dealt with the plaintiff's complaint as to noise as well as obstruction, but the part relating to obstruction only was as follows: "I duly received your letter of March 24, 1927, and I have to thank you for the intention therein expressed of doing everything possible to minimise the nuisance I complained of. The hotel has now been open for four weeks, and I confess I have been able to detect very little evidence of this intention having been carried out, and I must say emphatically that the hotel as at present conducted very seriously interferes with the reasonable quiet enjoyment I am entitled to at my house. The disturbances commence before 6 o'clock in the morning with the delivery of the milk and continue with the removal of the kitchen refuse, empty bottles, house refuse, etc., the delivery of the ice, mineral waters, beer, and general food supplies. The east end of Curzon Street has every appearance of being used as the goods yard of the hotel. Vans stand side by side to deliver or receive goods which, while waiting to be disposed of, are dumped on the highway, and there is practically a continuous procession of men in front of my house carrying the goods to the hotel yard or in the reverse direction. When, as not infrequently happens, three vans are stationed in the roadway, access to my house by vehicles is impossible. The roadway is usually obstructed by the motor carrier. . . . . It appears to me that the hotel is taking an entirely unfair advantage of the fact that Curzon Street is for vehicular purposes a cul-de-sac and not a thoroughfare. The hotel has the misfortune of enjoying a frontage to Curzon Street of less than 10 feet, and this at a point where the average width of the street is only about 14 feet, and this being so, I am convinced that the hotel is not entitled to make a convenience of the thoroughfare to the annoyance of adjoining owners. . . . . I cannot help thinking much could be done to minimise the nuisance I complain of if the bulk of the goods was delivered in Berkeley Street and Stratton Street where the hotel has ample frontages, and by regulating the movements of the staff and restricting the removal and arrival in Curzon Street between the hours of 10 P.M. and 8 A.M." This was answered on May 7, and the letter dealt with both complaints, and was as follows: "I have arranged for the laundry and the first clearance from Berkeley Street and also put large "Silence" notices up in the kitchen and am experimenting with microphones in the kitchen too, but when all is said and done this is a large first class hotel and there must be a certain amount of noise from the work of the hotel. This is frankly the position. I again emphasise that Mr. Devegney"—who was the manager of the hotel—"has made alterations to meet your wishes in every way that is practical, but the staff and goods entrance is in Curzon Street, and I am afraid that is a fact that has to be accepted, but no doubt when the plans were prepared, you had knowledge of the building and, of course, a hotel cannot be as quiet as Devonshire House garden. I would again emphasise our desire to meet you in every way practicable, and most stringent instructions have been given to minimise your inconvenience. With regard to the traffic question, I think that has now been stopped."

At that time instructions were given by the defendant company with regard to the delivery of goods, so that a number of tradespeople dealing with the defendant company after that date made their deliveries to other entrances of the hotel and not at the Curzon Street entrance, and a man was employed by the defendant company to control the traffic coming to the hotel entrance in Curzon Street. The plaintiff again wrote on May 16 acknowledging the letter of May 7, 1927: "All I ask is that the reasonable quiet enjoyment I am entitled to at my house shall not be interfered with. I am, unfortunately, only too well aware that the staff and goods entrance of the Mayfair Hotel is in Curzon Street, but seeing that the hotel possesses a frontage to that street of only about 15 feet, the idea of using such a narrow frontage for so important a purpose as staff and goods entrance has always seemed to me a mistake. At any rate, if this arrangement stands, the hotel must accept the consequences, one of which is, I am convinced, that the hotel will be held not entitled to make a convenience of the public thoroughfare to the annoyance of adjoining owners." That was answered on May 18, 1927, by the managing director: "Many thanks for your letter of the 16th inst., and I want to reiterate our intention and desire to do everything we can to minimise any discomfort that may be caused you. If at any time we can be of service to you, you have only to command us. It would be a great pleasure to me to be able to find some way in which my company could compensate any disadvantages that may have arisen." There was a further complaint on May 29 addressed to the manager of the Mayfair Hotel, in which the plaintiff said: "When you called upon me on the 10th inst. I understood you to say that as from the following day (Wednesday, the 11th) the kitchen refuse would not be cleared from the Curzon Street entrance, also that goods would be delivered or removed only by vans which could enter the hotel yard. The van collecting the kitchen refuse was standing in front of this house for some time this morning between 8 and 9 o'clock." That was answered by the manager of the Mayfair Hotel on May 30: "I am in receipt of your letter of yesterday's date and regret to hear that the fact that a van stopped in front of your door was an annoyance to you. I am certain that you know of our good will to prevent any trouble of this nature, and you know it was an exception. I have again given strict instructions that no vehicle should stop in front of your doors. I am sorry to say that we had some unfortunate accident in our goods lift, which prevented us from taking the refuse away yesterday, as we would have wished, but I quite understand this must be our own trouble."

After this no complaints in writing were made by the plaintiff to the defendant company. It appeared, however, that he continued his complaints to the town clerk of the city of Westminster, for on April 26, 1928, the town clerk wrote to the defendant company stating that the council continued to receive complaints as to the user of the public way in Curzon Street for the receipt and despatch of goods at the Mayfair Hotel. It appeared from the evidence given in the proceedings that the Westminister City Council, as the result of the plaintiff's complaint, stationed one of their inspectors in Curzon Street to report on the traffic coming to and from the hotel. No steps were taken by the Westminster City Council as the result of the complaints, and on June 15, 1928, the plaintiff's solicitors wrote to the

Gordon Hotels Company, Ld., who in fact owned the whole of the shares in the defendant company, in these terms: "We are instructed to refer to the correspondence which passed between our client, Mr. Vanderpant, of 62A Curzon Street, W., and Sir Francis Towle last year and to the frequent occasions since then when our client has had to complain personally to the manager of the hotel of the obstruction of the roadway of Curzon Street in the immediate neighbourhood of his house and the hotel yard, and of other matters connected with the carrying on of the hotel. Our client has now decided that he must institute proceedings against the hotel as regards their undue user of the roadway of Curzon Street, and also to have it determined by the Court whether your company is entitled to continue to conduct the hotel in such a way as to constitute a nuisance in what is essentially a residential locality. We shall issue a writ within the next few days, and meanwhile we shall be glad if you will refer us to your solicitors and instruct them to accept service thereof on behalf of the company." That was answered on June 19, 1928, by a letter giving the name of the solicitors who would accept service of the writ. The writ was issued on July 6, 1928.

Gavin Simonds K.C. and *H. C. Bischoff* for the plaintiff. The plaintiff is entitled to the injunction he is seeking as regards both the obstruction of the public highway opposite his private residence and the nuisance caused by the noise arising from the hotel kitchen. On the first question —namely, obstruction of the public highway—the evidence will show that the public highway opposite the plaintiff's residence has been very seriously obstructed. As to the law on the subject of the obstruction of a highway see *Barber* v. *Penley*. (1)

C. J. W. Farwell K.C. and *A. de W. Mulligan* for the defendants. The issue whether there is an actionable nuisance by obstruction is entirely separate from the issue whether there is an actionable nuisance by noise; and

(1) [1893] 2 Ch. 447, 449.

different considerations of law apply. The plaintiff's action for obstruction, it is submitted, cannot succeed. The evidence adduced on his behalf is not sufficient to constitute a nuisance; even if his evidence was given in an action commenced by the Attorney-General on behalf of the public for obstruction of a public highway, and not, as in the present case, where a private individual is suing for a nuisance to himself caused by the obstruction of a public highway. The evidence to support an action by a private individual must be at least as strong as one to support an action by the Attorney-General. A private individual must also allege and prove substantial damage, and in the absence of substantial damage, even though the evidence might have supported an action by the Attorney-General for obstruction, the plaintiff fails. As to the distinction between a public nuisance by obstruction and a private nuisance see the case of *Soltau* v. *De Held* (1); and the judgment of Kindersley V.-C.

[LUXMOORE J. If a private person wants to establish a nuisance he must allege and prove that he has suffered special damage.]

Yes. The reason for the difference between an action by a private individual and one by the Attorney-General is that the Court does not like a multiplicity of actions. The second case is *Benjamin* v. *Storr* (2); and see the judgment of Brett J. A private individual must prove special or substantial damage. It is submitted that the real effect of all these cases is that a private individual if he can show that he is in a peculiar position as regards the public, that is, in a different position; and can prove that he has suffered damage which the public do not suffer, then he is entitled to relief by the Court. A mere inconvenience in going and coming to and from a house is not enough to sustain an action.

[LUXMOORE J. It must be a question of degree.]

If a valuer on behalf of the plaintiff had been called and said that in his opinion the value of the plaintiff's house had been depreciated because it was impossible to get to the front door, and the Court had accepted the evidence, then an action would probably lie.

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(1) (1851) 2 Sim. N. S. 133, 145, 146.

(2) (1874) L. R. 9 C. P. 400, 402, 406.

[LUXMOORE J. It must be something that can be measured in damages.]

Yes. The plaintiff must show that he has been specially damaged: see the basis upon which such cases as *Barber* v. *Penley* (1); and *Lyons, Sons & Co.* v. *Gulliver* (2) were decided.

[LUXMOORE J. In *Benjamin* v. *Storr* (3) Brett J. says that the three things in cases of this kind that have to be established to enable a private plaintiff to sue are, that the damage must be particular, direct and substantial.]

Yes. Denman J.'s judgment also should be considered. Here the plaintiff has not proved that he has suffered any damage. The fact that from being a quiet street, it has by reason of the defendant company's hotel become a busy one, does not give the plaintiff a right of action. A person being hindered for a short time from approaching the front door of his residence does not constitute obstruction, entitling him to sue. It is always a question of degree: see *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (4), there one sees it is a question of degree. The evidence here is not, firstly, sufficient to constitute an obstruction at all, and, secondly, if it does constitute an obstruction, then it is not one which is actionable because it is not so unreasonable as to entitle the Court to interfere: see also the case of *Attorney-General* v. *W. H. Smith & Son.* (5)

[LUXMOORE J. That case was one by the Attorney-General suing on behalf of the public; there must be something higher in the case of a private individual.]

Yes. See also *Barber* v. *Penley* (1), and *Lyons, Sons & Co.* v. *Gulliver* (6), neither of which were actions by the Attorney-General. There is no evidence produced by the plaintiff sufficient to show obstruction, and on this point it is submitted his action must fail.

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(1) [1893] 2 Ch. 447.
(2) [1914] 1 Ch. 631.
(3) L. R. 9 C. P. 400, 407, 408.
(4) [1900] 1 Ch. 276, 279.
(5) (1910) 26 Times L. R. 482.
(6) [1914] 1 Ch. 631, 633, 635.

As to the question of nuisance by noise, the position is different; it is quite a distinct issue. Is the noise—if any—alleged by the plaintiff sufficient seriously to disturb a normal person? All the witnesses on this question called on behalf of the plaintiff, including the plaintiff himself, may—unconsciously no doubt—have, owing to the change from the former peacefulness of the garden of Devonshire House to the state of things brought about by the erection of the defendant company's hotel—anticipated noise and therefore somewhat magnified its effect. It is submitted that the plaintiff is entitled to relief—if any—only within his strict legal rights; and further the effect of any relief on a large business which has been built up by the defendant company should be carefully considered.

[LUXMOORE J. Whether it is a big corporation or a private individual, the position is the same.]

As to the effect noise may have, see *Gaunt* v. *Fynney* (1), where the remarks of Lord Selborne L.C. in the course of his judgment are in point. It may be that the witnesses of the plaintiff unconsciously listen for a noise. Of course there may be noises of which they are entitled to complain; there is a difficulty about that. As regards the day time, it is submitted, the plaintiff has produced no evidence to entitle him to an injunction. There is certainly some noise in the kitchen which might disturb the plaintiff in the evening.

[LUXMOORE J. The question is whether the noise from the kitchen can be prevented from escaping.]

The question is difficult, as undoubtedly the witnesses have shown that they were disturbed more or less by sounds from the kitchen about the same time, but it is submitted that, having once been disturbed, they began to listen for noises from the kitchen, and therefore anticipated them.

Further, it is submitted that the following principle of law applies here as regards the kitchen of the hotel. If a person takes a grant over the property of another, and it is in the contemplation of both parties that the grantor's property is going to be used for a particular purpose, the grantee cannot

(1) (1872) L. R. 8 Ch. 8, 13.

complain unless he can establish by evidence that the contemplated user is improper: see *Lyttelton Times Co.* v. *Warners, Ld.* (1) It is a question of implied contract: see *Pwllbach Colliery Co.* v. *Woodman* (2); and the judgments of Lord Loreburn and Lord Parker. The principle is explained by Lord Loreburn in *Lyttelton Times Co.* v. *Warners, Ld.* (3)

If any one makes a grant to another, and does not expressly reserve rights in the land, no rights in the land can be implied in respect of the land which he retains.

When the agreement of March 30, 1926, relating to the then proposed hotel and the effect of the building on the plaintiff's windows facing the proposed site, was made between the plaintiff and the defendant company, it was the common intention of the parties that the purpose for which the building on the part of the grantor's land facing the plaintiff's house was to be used was that of a kitchen. It is submitted therefore that the grantee cannot complain. The plaintiff got a benefit—namely, a right to light over the property of the defendant company, but with the full understanding that the defendant company's property was to be used for a particular purpose. Therefore he impliedly contracted that the defendant's should be at liberty to use their land for the purposes indicated; and if the plaintiff takes the benefit, he must also take the burden which results from the user of the land if such user was in the contemplation of both the parties.

A. de W. Mulligan following. There is also the implication that the plaintiff represented that he would not object if the kitchen were put in the position it was to be placed in. This may be inferred from the agreement of March 30, 1926, between the trustee for the defendant company and the plaintiff relating to the then proposed hotel about to be constructed on the part of Devonshire House garden which had been acquired by the defendant company. The plaintiff must be taken to have represented that he would not object if the building were constructed according to the plan, that is that portion of the building marked on the plan as a kitchen being used as a kitchen. It is somewhat like estoppel: see Lord Halsbury L.C. in *Colonial Bank* v. *Cady & Williams* (1); see also the case of *Carr* v. *London and North Western Ry. Co.* (2), where a rule very much in point here is laid down. The plaintiff has caused the defendant company to alter its position and he cannot now withdraw.

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(1) [1907] A. C. 476.

(2) [1915] A. C. 634, 638, 646.

(3) [1907] A. C. 476, 481, 482.

Gavin Simonds K.C. in reply. No implication of representation arises under the agreement, the kitchen as shown on the plan in the agreement of March 30, 1926, was not the kitchen as ultimately built on the site; it is shown on the plan as having no openings facing the plaintiff's house. Therefore the defendant company cannot say that they have been licensed to commit a nuisance by carrying on the kitchen business in a kitchen which has windows opening on to the plaintiff's house. There must be a common contemplation of user: see on this point Lord Parker's remarks in *Pwllbach Colliery Co.* v. *Woodman.* (3) Here it is nihil ad rem what is the character of the particular building.

On the question of fact whether there has been a nuisance by noise, the Court of course cannot take into consideration the effect of an injunction on the defendant company's large hotel business. There has undoubtedly been a great volume of noise proceeding from the kitchen, and the close proximity of the plaintiff's private residence must be taken into consideration. The evidence shows that the plaintiff had to keep his windows closed in the day time as well as at night, though it is admitted that the noise is more bearable if the ventilators of the defendant's kitchen were kept closed. But all the plaintiff's witnesses have stated that they have been greatly disturbed at night by the noise, and cannot get proper sleep. It is submitted that the noise does constitute a legal nuisance. The plaintiff is entitled to the injunction that he seeks.

As to the question of the obstruction of the highway, the presence of the Attorney-General is not required.

(1) (1890) 15 App. Cas. 267, 273.

(2) (1875) L. R. 10 C. P. 307, 317.

(3) [1915] A. C. 634, 648.

If a cul-de-sac in which any one has a house were blocked, the complainant can sue upon a particular injury to him, although he cannot prove any other special injury than that he alone of the public lived at the end of the cul-de-sac: see *Spencer* v. *London and Birmingham Ry. Co.* (1)

[LUXMOORE J. In *Soltau* v. *De Held* (2), Kindersley V.-C. seems to accept *Spencer* v. *London and Birmingham Ry. Co.* (1) as an example of the case where you have to allege and prove special and particular damage.]

It is submitted that if A. B. is prevented by some obstruction from getting with reasonable convenience into his own house, the mere plea and proof of that is sufficient without any further allegation: see the words of Jessel M.R. in *Original Hartlepool Collieries Co.* v. *Gibb.* (3) It is impossible to say at what point the individual having the use of the highway, exercises his public right of walking along the highway and his private right of walking along the highway to his house. He might be obstructed by a barrier, which might not affect the public.

[LUXMOORE J. There might be then a cause of action.]

Then it would be unnecessary to prove special damage.

[LUXMOORE J. You would have proved it then.]

The facts prove it.

[LUXMOORE J. Special damage there would mean damage different from the damage suffered by the other members of the public.]

Then a valuer need not be called to prove that the value of the property has suffered: see further Jessel M.R.'s judgment in *Original Hartlepool Collieries Co.* v. *Gibb* (3); also *Fritz* v. *Hobson* (4) and the judgment of Fry J.

It is submitted that if the plaintiff has, by the acts of the defendant company, been interfered with in the reasonable access to his house, then he has suffered a particular and special damage entitling him to bring the action and to an injunction. The facts show that he has been obstructed, and he is entitled to an injunction.

Cur. adv. vult.

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(1) (1836) 8 Sim. 193.

(2) 2 Sim. N. S. 133, 151.

(3) (1877) 5 Ch. D. 713, 721, 722.

(4) (1880) 14 Ch. D. 542, 551, 554.

July 29. LUXMOORE J. The plaintiff in this action seeks an injunction to restrain the defendant company from obstructing the public highway opposite his house, No. 62A Curzon Street, Mayfair, so as to cause a nuisance to the plaintiff and those occupying the house; and as ancillary to that injunction, a further injunction to restrain the defendant company from so conducting its business at or in connection with the Mayfair Hotel, as to induce or permit any person or persons transacting business with the defendant company at the hotel, to obstruct the public highway so as to cause a nuisance to the plaintiff and those occupying the house. The plaintiff also seeks an injunction to restrain the defendant company from causing a nuisance to the plaintiff and those occupying the house, by noise arising at the hotel from shouting, loud talking, or the handling of kitchen or domestic utensils, milk churns, and other articles. [His Lordship stated the facts as substantially set out above.]

The plaintiff's claims raise two distinct and separate issues: (1.) Has the defendant company caused any obstruction of the public highway of which the plaintiff is entitled to complain? and (2.) Has the defendant company in carrying on the hotel business caused a noise sufficient to entitle the plaintiff to the relief which he claims in this respect? I propose to deal with each of these issues separately, and I will take that of obstruction first.

Evidence was given by the plaintiff and on his behalf to support the claim in respect of obstruction, and I will deal with this evidence in due course. But before doing so, I think it will be convenient to state my view as to the law relating to the obstruction of a public highway, having regard to the rights of the public and those members of the public who occupy premises abutting thereon. Speaking generally, the public have the right of free and unobstructed passage over the whole of a public highway. The owner of premises abutting on a public highway is entitled to make a reasonable use of that highway for the purpose of obtaining access to his own premises, and of loading and unloading goods at his premises. But the right of the public is a higher right than that of the occupier, and if the user by the occupier, though reasonable so far as the particular business carried on by him is concerned, in fact causes a serious obstruction to the public, then the private rights of the occupier must yield to the public rights, and the Court will interfere by restraining the continuance of the obstruction. In every case the answer to the question whether the public right has been interfered with must necessarily depend on the extent of the user; in other words, the question is always a question of degree. This kind of question can only be determined after a careful consideration of all the facts of the case. This, I think, is a convenient summary of the law as laid down in such cases as *Original Hartlepool Collieries Co.* v. *Gibb* (1); *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (2); *Attorney-General* v. *W. H. Smith & Son.* (3)

The law as I have just stated it is that which is applicable to a suit brought by the Attorney-General on behalf of the public to restrain the obstruction of a public highway by a person occupying premises abutting thereon. Does the same law apply to the case of a suit by an individual? Again, speaking generally, I think it does, but the private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public; and moreover he must prove that the particular damage which he has sustained is direct and substantial. This is, I think, the result of the authorities which were cited to me on this point—namely, *Benjamin* v. *Storr* (4); *Barber* v. *Penley* (5); *Lyons, Sons & Co.* v. *Gulliver* (6), which is usually referred to as the *Palladium Case*; and *Soltau* v. *De Held* (7), which was cited for the passage in the judgment of Kindersley V.-C.

The present action is brought by a private individual, and not by the Attorney-General on behalf of the public. The plaintiff must therefore prove that he has been unreasonably obstructed by the defendant company, and that he has suffered particular damage; and that that damage is direct and substantial. Has he succeeded in satisfying all those conditions? As I have pointed out, in each case the question to be determined is one of fact.

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(1) 5 Ch. D. 713.
(2) [1900] 1 Ch. 276.
(3) 26 Times L. R. 482.
(4) L. R. 9 C. P. 400.
(5) [1893] 2 Ch. 447.
(6) [1914] 1 Ch. 631.
(7) 2 Sim. N. S. 133, 145–8.

The plaintiff claims that he has been obstructed in the access to his own house, and if the evidence is sufficient to establish that the defendant company has interfered substantially with the reasonable access to the plaintiff's house, then in my opinion the plaintiff will have satisfied the necessary conditions to enable him to maintain this action, because he would then have established the fact that he has sustained an injury affecting him particularly, in a manner beyond that in which other members of the public are in fact affected, and the damage resulting from that injury would be direct and substantial. It would not then be a case in which, to use the words of Cozens-Hardy M.R. in the *Palladium Case* (1), it would be necessary for the plaintiff to prove that he has lost *1l.*, *2l.* or *3l.* by reason of the nuisance and obstruction of which he has complained.

Now having stated my view of the law as it applies to a suit by a private individual in respect of the obstruction of a public highway, let me consider the facts as disclosed by the evidence adduced before me.

The plaintiff's own evidence in chief, so far as obstruction is concerned, was given in general terms, and it was a little difficult to ascertain from it what was the extent of the obstruction of which he was complaining. I will give a few typical passages by way of example. On the first day, he is asked this question: "(Q.) One month after the hotel had been opened, had you any complaint to make of the obstruction of the highway? (A.) I had a lot of complaints to make. (Q.) Would you explain, first of all in general terms in your own words, what it was of which you complained? (A.) The first cause of complaint was a van, collecting offal, which stopped outside my house. Another

(1) [1914] 1 Ch. 631, 641.

cause of complaint was the delivery of the milk in the early morning." Then later on, he is asked questions about the supplies coming to the Mayfair Hotel, and he says that the cycle carrier was something of which he complained, and in answer to a question about what the cycle carrier did, he said: "The cycle carrier was used to fetch all sorts of supplies, and one of my causes of complaint is that supplies, which are frequently brought in a taxicab which stops outside my house, are taken out outside my house and then taken into the hotel." Then Mr. Gavin Simonds says: "Does that go on to-day? (A.) It went on in the last month. At that period they used to have large quantities of baize-covered tables brought there, and they used to be spread about the surface of the roadway in Curzon Street as though it was laid out for a party, and chairs also used to be dumped on to the roadway." Then on the second day he is asked again certain questions about obstruction. "(Q.) Were there occasions before July of last year when access to your front door was obstructed by vans or lorries, whatever they may have been, delivering goods to the defendant hotel? (A.) On many occasions access to my house was obstructed, and furthermore, on many occasions, I called the attention of somebody described as a traffic superintendent or porter, to the fact. (Q.) Apart from your own house, has the access of other people coming to your house been similarly obstructed? (A.) It has." Then later on he is asked with regard to certain notes he had taken, and he is asked this question: "I suppose you did not make a note every time you saw anything? (A.) No, because there ceased to be any object, because it was their continual practice to use the road in front of my house as their goods yard." Then further on the plaintiff speaks with regard to something which had happened, I think on November 23, 1928, when some chairs were being delivered, and he also further said, referring to the previous night, the night before he was giving evidence in these proceedings: "Last night at 6.45, a large motor van delivered gilt chairs — about two dozen of them — and I phoned through to call the manager's attention to the fact so that he could verify it then and there. (Q.) Where were the chairs stacked ? (A.) They were stacked on the roadway." Then he is asked about the time, and then he is asked : "Were they stacked near your house ? (A.) Last night they were just in front, but that is all. A motor van was stopped outside the adjoining premises in the middle of the road, and the chairs were between the van and the entrance to the hotel yard." Then I asked him : "Could you have got to your front door in a motor ? (A.) Yes, I could have got there, but I could only have got out again by the man backing out."

It will be noticed from these passages that the plaintiff's evidence consists to a considerable extent of statements to the effect that the access to his house is obstructed. In other words the plaintiff, instead of stating the facts which he claims constituted the obstruction, states his own conclusion without, in some cases at any rate, any statement of the facts on which such conclusion is based. The plaintiff in fact explained, in his cross-examination by Mr. Farwell, to some extent what he meant by obstruction. On the second day he is again asked a question about goods being delivered by a taxicab which drove up to his door and the man getting out and walking into the hotel, and he is asked : "Would you feel you had a cause of complaint if a taxicab drove up to your door, and a man got out and paid it and went away, and then walked into the hotel ? Would you then feel that you had a cause for complaint ? (A.) I think so, and that occurs nightly. (Q.) Nightly ? (A.) I called Mr. Devegney—the manager's—attention to it." Then he is asked about an incident when three vehicles were standing in a line west of his house, and Mr. Farwell asked him : "I thought we had agreed about this, that three vehicles standing well west, that is to say, so that they are quite clear of your front door in a line, one behind the other in the middle of the road, would not cause you any obstruction ; that is so, is it not ? (A.) That is so. (Q.) When you say that you frequently see three or four, are you intending to suggest that those vehicles were not standing one behind the other, but that they were standing across the road ? (A.) I think I am intending to say that they are three or four vehicles standing in the centre of the road, except that I say they are side by side." Then he is asked this : "If a vehicle comes down Curzon Street, and stops west of your house—when I say 'west,' I mean so that the vehicle's bonnet or head is clear of your house—in the middle of the road, and a boy or man proceeds to take out goods and carry them to the yard of the hotel, that does not cause you any damage, does it ? (A.) It causes me annoyance ; it is using the public highway as a goods yard." He was then asked to be a little more specific as to the occasions on which he had in fact been prevented from getting to his own front door, and his evidence was that over a definite period, from May, 1927, to the present time, he was only able to point with certainty to four definite occasions when he was unable to get to the front door of his house in a taxi or another car, though he said he thought there were other occasions when he was in fact so prevented. He was asked if he ever made any request to the driver of the vehicle obstructing his access to his front door to move away and so enable him to obtain the access he required, and he stated quite frankly that he could only remember one such occasion, and he added that the request was complied with immediately.

On the plaintiff's evidence alone it would be impossible to hold that there has been any unreasonable obstruction which would give rise to any legal rights enforceable by him against the defendant company. But it is necessary to consider the rest of the evidence.

The next witness was an observer employed by a private detective agency, engaged by the plaintiff for the express purpose of observing and of reporting as to the vehicles coming to the plaintiff's end of Curzon Street. He watched the premises daily for a period between June 19, 1928, and June 25, 1928, and also on May 18, 1929 ; he spent eight hours each day on observation, except on Saturdays. He made a note of all vehicles coming to the plaintiff's end of Curzon Street to deliver or collect goods to or from the defendant company's hotel. There was a considerable number of such vehicles in the course of each day. He gave his evidence quite fairly, and admitted that while he was carrying out his observations, the traffic manager employed by the hotel took every possible precaution to see that vehicles did not stop in front of the plaintiff's house, and the note that he took, itself shows that the traffic manager was successful in this, for it is only on some three or four occasions during the whole period of observation that any vehicles stopped in front of the plaintiff's door. I asked him if he could tell me how long, if at all during his observations, it would have been impossible for a vehicle to get to the plaintiff's door, and he answered: "I should think on four or five occasions on each day; for about five to ten minutes on each occasion." I asked him if he could point out to me any particular occasion from his note, and after examining his notes, he selected one occasion. It is taken from his evidence on the third day, and he says: "I should think on June 19, 1928, from 10.55 until 11.10 A.M. or 11.15 A.M. (Q.) What is that? (A.) There is a van just leaving at 10.45, and at 10.55 a horse van pulled up on the far side of the house—that would probably be on the north side. (Q.) It was not in front of the house? (A.) No, it was to the west. (Q.) It did not stop there? (A.) No; it was leaving." He was unable to point to any other occasion.

The next witness was a Mr. Milner, a photographer, who was engaged by the plaintiff to take photographs of all such incidents as might occur during certain periods of time as might be said to cause obstruction of the access to the plaintiff's house. He spent five different periods at the plaintiff's end of Curzon Street—namely, on June 18, 19, 20 and 21, 1928, and one day in May, 1929. On each day, the period of observation occupied several hours. During the five different periods, the witness took some ninety-three photographs. A consideration of those photographs throws a considerable light on the plaintiff's claim, for out of the whole ninety-three, there are certainly not more than four cases where it would be impossible for a vehicle to obtain access to the plaintiff's front door. A large number of photographs show goods in sacks and parcels being carried past the plaintiff's house, but by no stretch of the imagination could such incidents be said to cause anything in the nature of an obstruction.

Mr. Lydall, the plaintiff's solicitor, was called. He stated that he had frequently stayed with the plaintiff at 62A Curzon Street. His evidence was mainly directed to the other issue, but he did say that he personally had never experienced any difficulty in coming to or leaving the house in a vehicle, though it is only fair to say he generally came and went on foot. Three witnesses who live in this part of Curzon Street were called on the plaintiff's behalf, Mr. and Mrs. Brocklebank, who live at 62 Curzon Street, on the opposite side of Curzon Street to No. 62A Curzon Street. Neither of them gave any evidence with regard to obstruction of the access to the plaintiff's house; they only spoke to the access to their own house. Their evidence was of little positive value to the plaintiff's case, but it has some bearing on the defence, because it establishes that even so far as they are concerned, the actual access to their house had not been substantially obstructed, for it has only been necessary on a few occasions to ask vehicles to move so as to enable them to draw up to their own front door, a request which was apparently on each occasion answered satisfactorily. The other witness, a lady, who lives in a flat in the block next to the plaintiff's house and on the same side of the street, said nothing about obstruction. The only other witness who was called by the plaintiff on this part of the case was a Mr. Williams, the inspector employed by the Westminster City Council to make the observations to which I have already referred. His evidence left no doubt in my mind that although there was a substantial number of vehicles delivering goods to the hotel during each day, the traffic was so regulated as to leave the access to the plaintiff's front door unobstructed, and that if vehicles were unable to get into the defendant company's yard, they were kept standing for the time necessary for the delivery of the goods in a position in the centre of Curzon Street to the west of the plaintiff's house, or in such a manner as to cause as little inconvenience as possible.

It is to be observed that, apart from the plaintiff, no one has been called to say that he or she was unable to get access to the plaintiff's house by reason of the state of the traffic in Curzon Street. Further, the evidence is that no one but the plaintiff has ever made any complaint of obstruction to the defendant company. It is true that complaints were made to the Westminster City Council, with a view to getting the Council to terminate the agreement under which the hotel's entrance in Curzon Street was maintained; but the result of such complaints was, at the best, of negative value so far as the plaintiff was concerned, for the Council, after causing observations to be made, have not terminated the agreement referred to.

The evidence given by the plaintiff and on his behalf has satisfied me beyond any doubt that there is no substantial obstruction of the access to his house of which he has any legal ground for complaint, and I hold that there has not in fact been any unreasonable obstruction of his access, with the result that, so far as this part of the action is concerned, the plaintiff's claim fails.

I will now deal with the second branch of the action: Has the defendant company, in carrying on the hotel business, caused such a noise as to entitle the plaintiff to relief? The defendant company has put forward two defences. The first is a denial that any nuisance, sufficient to entitle the plaintiff to relief at law, has been caused by them, and the second is a legal defence. I will deal with this latter defence first. As I have already pointed out, the plaintiff bought his house in 1919, and at the time he bought it, the site now occupied by the hotel was part of the gardens of Devonshire House, and undoubtedly the place was exceptionally quiet and peaceful. At the end of 1925, when the erection of buildings on the site of the Mayfair Hotel was in contemplation, questions arose with regard to the effect of such buildings on the plaintiff's windows facing the hotel site. As the result of negotiations between the solicitors for the plaintiff and the solicitors for the hotel company, an agreement was entered into on March 30, 1926, between Arthur Octavius Edwards

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of the one part and the plaintiff of the other part. At the time this agreement was entered into, the defendant company had agreed to acquire the interest of Mr. A. O. Edwards in the site, and Mr. Edwards was in consequence merely a trustee of the site for the defendant company; this was well known to the plaintiff. The agreement, so far as it is material, provides: "(1.) The said Arthur Octavius Edwards for himself and his successors in title owner or owners for the time being of the premises comprised in and intended to be demised to him by the before mentioned lease agrees that notwithstanding any rights he may have under"—a certain building agreement—"or the lease to be granted thereunder he will not during the continuance of the said lease block up any of the windows in the eastern wall of No. 62A Curzon Street and will only make use of so much of the said eastern wall as is necessary for the purpose of the building which is now in course of erection on the land to be comprised in the said lease and that he will leave an area of the extent and width shown upon the diagram plan attached hereto in front of the window to the dining room of No. 62A Curzon Street shown on the said plan and that the walls of the said area and the sloping roof over the hotel scullery shall be faced with white glazed bricks or white glazed tiles and that the said area shall be paved with cement paving and drained to the open yard to the north of same and that the said Harry Sheil Elster Vanderpant shall have the use of the said area during the continuance of the said lease (but so that such user shall be deemed to be enjoyed with the express permission of the said Arthur Octavius Edwards) and that he the said Arthur Octavius Edwards will not during the continuance of the said lease seek to acquire any rights of light over the site of the said No. 62A Curzon Street and that he will not object to the height of the said No. 62A Curzon Street being raised to a similar height to that of the buildings now in course of erection by the said A. O. Edwards as shown on the annexed diagram plan." Then there was a provision that a certain alteration might be made in the wall of the area. Clause 2 provides: "In consideration of the agreements on the part of the said

Arthur Octavius Edwards contained in paragraph 1 hereof the said Harry Sheil Elster Vanderpant agrees that he will not do or cause or permit to be done any thing or act so as in any way to interfere with or obstruct or prevent the erection of any building which is now in course of erection or may hereafter be erected by the said A. O. Edwards on the land to be comprised in the said lease so long as the provisions of clause 1 hereof are duly observed and so that any building hereafter to be erected by the said A. O. Edwards shall not diminish the access of such light and air to the windows in the eastern wall of No. 62A Curzon Street as will be enjoyed immediately on the completion of the buildings now in course of erection and will not at any time object to the erection of any such building or claim any damages in respect thereof provided that in erecting any such building the said Arthur Octavius Edwards observes the provisions of paragraph 1 hereof," and the agreement was entered into without prejudice to the rights of the owners of the freehold of the land.

The plan on the agreement shows, and the plaintiff admitted, that he knew that it was proposed to erect the kitchen of the hotel on that part of the site nearest to the plaintiff's house. Both the ground plan and the section plan show quite clearly the site of the kitchen, but there is nothing on the plan to show that there was to be any opening in the wall or roof of the kitchen on the side nearest the plaintiff's house. The plan also shows the yard which was to be made, with an entrance from it into Curzon Street and from the yard into the hotel.

The legal point raised by Mr. Farwell is this. He says that the plaintiff cannot complain of any noise from the hotel kitchen unless the plaintiff can establish by evidence that the noise complained of arises owing to the carrying on of the defendant company's hotel kitchen in an improper manner; because it is a principle of law that if a person takes a grant over the property of another and it is in the contemplation of both parties that the grantor's property is going to be used for a particular purpose, the grantee cannot complain of anything arising in the course of that contemplated user. This principle does not depend on the doctrine of estoppel or anything of that kind, but is in fact the result of an implied contract. The grantee asks the grantor to give him a right over his (the grantor's) land, and the grantor agrees to do so, but at the same time says: "I am going to use my land for a particular purpose," and on that the grant is made. The legal implication is that the grantor is entitled to use his land for the purpose contemplated when the grant was made, and there is an implied contract binding on the grantee unless there is evidence that the user is improper; and it is only in the case where the user is improper that the obligation is released, because it was never contemplated by either party that there should be an improper user. This principle is expounded in the case of *Lyttelton Times Co.* v. *Warners, Ld.* (1), and is accepted by Lord Parker in the *Pwllbach Colliery Co.* v. *Woodman.* (2) The passage where Lord Parker deals with the first named case in his judgment is as follows: "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones* v. *Pritchard* (3) and *Lyttelton Times Co.* v. *Warners, Ld.* (1) But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use. Thus in *Jones* v. *Pritchard* (3) it was obviously the intention of the parties that the chimney flues connected with the grantor's house should continue to be used by the grantor to get rid of his smoke, notwithstanding that a moiety

(1) [1907] A. C. 476.
(2) [1915] A. C. 634, 646.
(3) [1908] 1 Ch. 630.

thereof was conveyed to the grantee, and similarly that the flues connected with the grantee's premises should be used to get rid of the grantee's smoke, notwithstanding that a moiety thereof was retained by the grantor. There was no difficulty, therefore, in implying the appropriate easements. Similarly in *Lyttelton Times Co.* v. *Warners, Ld.* (1), the lessor was doing on property retained by him precisely what both parties at the time of the grant contemplated that he should do, neither more nor less, and under these circumstances the Court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee. *Richards* v. *Rose* (2) is a similar case. In *Hall* v. *Lund* (3) the decision may be explained on the doctrine of continuous and apparent easements, but it is equally explicable on the principle I am now considering. The common intention of the parties in that case may well have been that the bleaching works, the subject of the demise, should be carried on by the lessee in precisely the same manner as had theretofore been the case, the refuse therefrom being turned as theretofore into the natural watercourse which flowed through the lessor's property. I think, however, that Baron Wilde states the principle somewhat too broadly. 'A demise,' he says, 'of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the lessee would have a right to grind there, although the noise might annoy the lessor or his assigns.' It is true that a demise of an existing brewery or an existing mill would probably connote a common intention that the brewery or mill should be worked in the manner in which it had been worked prior to the demise, and therefore that if so worked it caused a nuisance to the lessor, he could not be heard to complain. But I doubt whether this would hold if the method of working were subsequently altered and a nuisance thereupon ensued, even though it might be proved that this method of working was the usual method, and that the lessee had been guilty of no negligence."

(1) [1907] A. C. 476.

(2) (1853) 9 Ex. 218.

(3) (1863) 1 H. & C. 676.

Does this principle apply to the present case? No doubt it was within the knowledge of both parties that it was intended to use the part of the hotel site next the plaintiff's house as the hotel kitchen, but there was nothing to suggest that the kitchen should have any opening on the side next to the plaintiff's house. The evidence, I think, shows that so far as the noise from the kitchen itself is concerned, the real reason why it is heard in the plaintiff's house is because there are in fact openings on the side facing the plaintiff's house, for the evidence has established to my satisfaction that no noise can be heard coming from the kitchen in the rooms of the hotel on the other side of the kitchen and that there is no opening from the kitchen facing the hotel side of it. Further, so far as the noise caused by the staff leaving through the entrance into the yard in Curzon Street and the delivery of goods into that yard is concerned, there is nothing on the evidence to show that the actual method of user of the yard for any of these purposes was in the contemplation of the parties.

For these reasons I think the principle on which Mr. Farwell sought to rely fails to be applicable to the present case.

It is therefore necessary to consider the question whether the defendant company, in the carrying on of the hotel business, has caused a sufficient noise to entitle the plaintiff to relief at law. Before I deal with what the evidence has established, I will state what constitutes an actionable nuisance by noise. Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthful enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter* v. *Selfe* (1) and the remarks of

(1) (1851) 4 De G. & S. 315, 322.

Knight Bruce V.-C. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case.

The evidence in the present case establishes the fact that the defendant company is carrying on the hotel business in a kitchen which, for all practical purposes, adjoins the plaintiff's house. It is ventilated by a series of windows which face the plaintiff's house, and those windows are almost invariably open. The staff employed in the kitchen when meals are in full swing numbers somewhere about seventy persons. The orders for the meals required are given and the meals are cooked in the kitchen ; and in addition, the plates required for the guests' use are heated and kept warm on a series of hot plates which have been erected in the kitchen. There is no doubt that the defendant company has done what it can to minimize the noise in the kitchen, but as Mr. Farwell, who argued the defendants' case with much moderation and ability, very frankly admitted, it is impossible to say that the carrying on of a large kitchen with the employment of a staff of about seventy persons, no matter what precautions are taken, does not make a considerable noise. The chief times at which this noise arises are naturally the times when lunch and dinner are being served, and there is also some considerable noise at supper time. The evidence of the plaintiff, his maid, and of Mr. Lydall, his solicitor, has satisfied me beyond all reasonable doubt that the noise from the kitchen is plainly heard in the dining room and bedrooms which have windows facing the hotel, and that such noise constitutes a nuisance of which the plaintiff is entitled to complain. So far as lunch and dinner times are concerned, the evidence has established quite clearly that it is frequently necessary to shut the windows of the dining room at No. 62A Curzon Street to prevent the noise interfering with the conversation, and, so far as supper time is concerned, that it is often impossible to get to sleep by reason of the noise coming from the kitchen or that the witness has been awakened from his or her sleep by such noise. Further than this, the evidence has satisfied me that there is a nuisance caused in the early hours of the morning by the staff of the hotel leaving by the entrance in Curzon Street, and later by the arrival of the staff and of the milk and ice. The noises thus caused have frequently awakened the several witnesses and have made it difficult for them to enjoy a proper period of rest and sleep. So far as the noise caused by the departure and the arrival of the staff and the delivery of goods is concerned, this would not, in my view, cause any substantial nuisance during the ordinary hours of the day, and I think it will be sufficient to restrain these particular matters by reference to the period between the hour of 10 P.M. in the evening and the hour of 8 A.M. in the morning. With regard to the kitchen I think the injunction must be in general terms.

The result of the whole action, therefore, is that the plaintiff succeeds on one issue and loses on the other. In these circumstances, and having regard to the extent of the evidence and the time occupied with regard to each issue, and to the fact that such issues are wholly independent of each other, I think the proper course is to say that neither party shall have any costs of the action.

Solicitors: *Lydall & Sons; Markby, Stewart & Wadesons.*

A. R. T.

C. A.
1929
Oct. 18.

ATTORNEY-GENERAL *v.* SUNDERLAND CORPORATION.

[1927. A. 2329.]

Local Government—Land acquired by Local Authority for Purposes of the Public Health Acts—Land used for Street widening and Public Gardens—Work carried out in accordance with Plan submitted to the Local Government Board—Public Gardens not open or dedicated to Public—Proposal to use Part of Public Gardens for Purpose of Street widening—Widened Street to be used as Parking Place for Motor Cars—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 154, 164—*Public Health Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 71), *s.* 68, *sub-s.* 1.

A local authority under the powers conferred upon them by ss. 154 and 164 of the Public Health Act, 1875, purchased certain land in 1896 for the purposes of: (1.) street widening; (2.) making new streets; (3.) providing public walks and pleasure gardens. The land was conveyed to the local authority for the purposes authorized by the Public Health Acts. A plan and specifications were submitted to the Local Government Board, and subsequently the scheme was carried out in accordance with the plan and specifications. The pleasure gardens were surrounded by railings, and were not dedicated or open to the public. In 1927 the local authority resolved to utilize one of the pleasure grounds for the purpose of street widening and providing a parking place for motor cars. Objections were raised by some of the occupiers of adjoining premises, and an action was brought to restrain the local authority from carrying out their resolution:—

Held, that the local authority having acquired the land under the powers conferred upon them by ss. 154 and 164 of the Public Health Act, 1875, for purposes which included street widening, were entitled under s. 68, sub-s. 1, of the Public Health Act, 1925, to use part of it as a parking place for cars.

Attorney-General v. *Hanwell Urban District Council* [1900] 2 Ch. 377, and *Attorney-General* v. *Pontypridd Urban District Council* [1906] 2 Ch. 257 distinguished.

Decision of Eve J. [1929] 2 Ch. 436 affirmed.

APPEAL from a decision of Eve J. (1)

The action was brought by the Attorney-General on the relation of certain occupiers of premises abutting on a piece of land belonging to the Sunderland Corporation known as The Shrubbery, bounded by East and West Sunniside and Norfolk Street, Sunderland, for a declaration that the Corporation were not entitled to make or provide or to cause

(1) [1929] 2 Ch. 436.

or permit to be made or provided a parking place for motor cars on any part of the land, and for an injunction to restrain the Corporation from making or allowing to be made a parking place thereon. The land in question was purchased by the Corporation in 1896, and was then in a derelict condition.

The Corporation had for some time contemplated purchasing The Shrubbery compulsorily, but ultimately they decided to purchase it by agreement. This was effected by a covenant to surrender, dated December 30, 1896, whereby the land was vested in trustees for the Corporation to be conveyed to the Corporation for the purposes authorized by the Public Health Acts and s. 7 of the Post Office Act, 1891 (54 & 55 Vict. c. 46).

The Shrubbery was purchased by the Corporation under the powers conferred upon them by ss. 154 and 164 of the Public Health Act, 1875 (1), for four purposes: (1.) to provide a site for a new post office; (2.) for the widening of adjoining streets; (3.) for the formation of new streets across the land; and (4.) the provision of public walks and pleasure gardens. A plan and specifications were submitted to the Local Government Board showing how it was proposed to use the land. An estimate was also presented to the Local Government Board showing how much of the money to be raised would be required for new streets, how much for the widening of existing streets, and how much for the provision of public walks and pleasure grounds. Eventually the defendants erected the post office, widened streets, made new streets, and constructed three ornamental gardens in accordance with the plan and specifications. These gardens were surrounded by high railings, and were not open or dedicated to the public.

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(1) Public Health Act, 1875, s. 154: "Any urban authority may purchase any premises for the purpose of widening opening enlarging or otherwise improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street."

Sect. 164: "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever. . . ."

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On July 13, 1927, the Corporation resolved to use part of The Shrubbery for the widening of the street, and to convert that part into a parking place for motor cars in pursuance of their powers under s. 68, sub-s. 1, of the Public Health Act, 1925, which provides that: "Where for the purpose of relieving or preventing congestion of traffic it appears to the local authority to be necessary to provide within their district suitable parking places for vehicles, the local authority may provide such parking places in accordance with the provisions of this section, and for that purpose may . . . . (c) by order authorize the use as a parking place of any part of a street within their district. . . ."

On August 10, 1927, a petition signed by about ninety persons and firms, owners or occupiers of premises adjoining, protesting against the use of any part of The Shrubbery as a parking place, was presented to the Corporation. By a letter dated August 11, 1927, the Corporation's town clerk informed one of the relators that the Corporation had decided to adhere to their decision of July 13. This action was then commenced at the instance of the relators.

Eve J. dismissed the action, holding that as one of the purposes for which the Corporation had acquired the land was street widening, they were not acting ultra vires in using part of The Shrubbery for that purpose, and that that being so they might, pursuant to their powers under s. 68, sub-s. 1, of the Public Health Act, 1925, use it as a parking place for cars.

The Attorney-General appealed. The appeal was heard on October 18, 1929.

C. A. Bennett K.C. and *D. A. S. Cairns* for the Attorney-General. Eve J. was wrong in holding that the Corporation could use the land in question as a parking place for cars. The powers of the Corporation to acquire land are conferred by ss. 154 and 164 of the Public Health Act, 1875. By s. 154 a local authority may purchase any premises for the purpose of widening, etc., any street, or (with the sanction of the Local Government Board) for the purpose of making any new street. By s. 164 a local authority may purchase any lands for the purpose of being used as public walks or pleasure grounds. By s. 7 of the Post Office Act, 1891, power is given to a local authority to contribute land or money towards a new post office. The documents in the present case relating to the application in 1895 to the Local Government Board for the loan for the purchase of the land show the manner in which the money was to be apportioned among the various objects for which it was borrowed—namely, land for a site for the post office, land for walks and pleasure gardens, and land for widening street. With regard to the land now in question, the Corporation having purchased it for purposes authorized by s. 164, it is ultra vires for them to apply it for purposes authorized by s. 154: *Attorney-General* v. *Hanwell Urban District Council* (1); *Attorney-General* v. *Pontypridd Urban District Council.* (2) One must go back to 1896, when the Corporation acquired the land, to ascertain the purposes for which it was then acquired. At that time the purpose for which they are now proposing to use the land—namely, the parking of cars—was unknown. They now intend to use the land under a new power acquired by them under the Act of 1926, and ought to be restrained by injunction from so doing: *Attorney-General* v. *Teddington Urban District Council.* (3) No one can say that the Corporation in using the land in the way they propose are using it for the purposes for which they acquired it. It is clear that they have no intention to use it for street widening, but propose to use it as a parking place for cars under the act of 1925.

Montgomery K.C. and *Wilfrid Hunt* for the Corporation. The test to be adopted in cases like the present is, under what statutory power did the Corporation acquire the land in question? *Attorney-General* v. *Pontypridd Urban District Council* (2); see per Collins M.R. and Romer L.J. (4) It is admitted that if land is acquired under one power it cannot be used for a purpose which requires the exercise of another power. But here the land was acquired under two powers—

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(1) [1900] 2 Ch. 377.

(2) [1906] 2 Ch. 257.

(3) [1898] 1 Ch. 66.

(4) [1906] 2 Ch. 257, 264, 265, 266.

namely, those conferred by ss. 154 and 164 of the Act of 1875. The power to make a new street was the only power which required the consent of the Local Government Board. It is true that at the time of the purchase of the land the Corporation had no power to use any part of it for a parking place, and that they did not obtain power to provide parking places until it was conferred on them by s. 68 of the Act of 1925; but the Corporation had then power to widen their streets on which vehicles might wait. Having purchased the land for the purposes enumerated in ss. 154 and 164 of the Act of 1875, the Corporation were not tied down by any closely defined scheme for its user, but might subsequently alter the use of the land from one to another of the purposes mentioned in the sections.

[They were stopped.]

LORD HANWORTH M.R. This appeal fails. I should have been prepared to say nothing but merely to adopt the judgment of Eve J. as expressing the ground on which I think this appeal must be dismissed, but out of deference to the argument presented by Mr. Bennett and Mr. Cairns I desire to add my views by way of supplementing the observations which have been made by Eve J.

In this case we start with the fact that there was an open space on more or less derelict land in the front of a certain number of houses used by the professional men of Sunderland, and at some time about 1890 the Corporation were minded to take over that land and to make certain uses of it. It is clear that before 1896, when the surrender of the land was actually made by the copyholders to the Corporation, the Corporation had desired to have this land or determined to acquire it for purposes which were not very explicitly expressed, but which were summarized in the application made by them to the Local Government Board for a loan to enable them to purchase the land and to make use of it when purchased. I may call attention to two or three of the letters and memoranda which passed at that time. The minute of June 15, 1892, by the Highways

Committee is this: "The Shrubbery"—as this open space was then called—"to be appropriated for the following purposes: Making new streets—making, forming and maintaining public walks or pleasure grounds, and the erection thereon of a post office, or any or either of such purposes." When, with greater precision, an apportionment had been made of the cost of the shrubbery land between the post office and the pleasure grounds, we find that there is a certain number of square yards allocated to the post office site and the rest to what are called the pleasure grounds, and when the loan is specifically dealt with it is then made clear that of the total sum of 8200*l.*, which was asked for on March 22, 1895, the sum of 3960*l.*, part of the 8200*l.*, was required as the purchase price of the land, and that was attributed as to 1250*l.* and no more for the purchase of the post office site, and 2710*l.* for the purchase of land for the purpose of public walks and pleasure grounds. Incidentally I may mention that the same letter proposed a loan for the purposes of street improvements. Therefore anyone reading that would, I think, find it impossible to say that the only purposes were public walks and pleasure grounds. The surrender of 1896 was made, and Mr. Bennett fairly admits that there is no restriction in terms contained in that deed. What is said is that under clause 26 of the deed the land is conveyed to the Corporation to be used and disposed of by them for the purposes authorized by the Public Health Act, 1875, and s. 7 of the Post Office Act, 1891, or some or one of such purposes. Pausing there, in 1896, when the Corporation became possessed of this land called The Shrubbery, I think it is impossible to say that there had been any definite dedication or allocation to any particular purposes of the land so acquired otherwise than that portion of it which was for the post office or that the purpose of the Corporation had been made plain on the point whether it was to be a garden or a street or a widened street, or something ancillary to those purposes. What we do find is this, that in 1896 the Corporation had secured power to make a new street, that special power being necessary in order that they might exercise the powers of s. 154 with reference to a new street. Therefore in 1896 the matter stood in this way, that they had purchased, and, having regard to the sanction of the Local Government Board, they had acquired the right of obtaining these premises "for the purpose of widening opening enlarging or otherwise improving any street, or (with the consent of the Local Government Board) for the purpose of making any new street." In other words, s. 154 was put into force by them after due leave had been obtained from the Local Government Board. They also had at that time a power unfettered by the necessity of obtaining any leave under s. 164, which is as follows: "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds." Reading those powers as they stand, I find it quite impossible to designate what quota of the purchased property, apart from the post office site, is to be used for the purpose of widening a street, or making a new street, or for a public walk, or for laying out public walks or pleasure grounds. It seems to me impossible to say that the Corporation were bound to allocate to the public walks or pleasure grounds so much as and not less than they had originally contemplated in 1896, and that they could not as time passed alter the proportion of the land used for widening streets and for new streets and for public walks and for gardens. Having regard to their powers under those sections and the lack of definition, I cannot hold the Corporation bound to any particular scheme as between the making of new streets, the widening of old streets, and the laying out of gardens or walks.

When once one has reached that position, it appears to me that when the powers of s. 68 of the Act of 1925 are introduced into the Act of 1875, the position of the Corporation is secure. Sect. 68 is to be read with the Act of 1875, and under that section there is the power to utilize any lands which may lawfully be appropriated for the purpose or by order authorize the use as a parking place of any part of the street. It seems to me that under those two powers the Corporation might make the parking place a part of the existing street and add to that part as a parking place a portion of the walk or garden; that is to say, subject always to their following the procedure laid down in sub-s. 2. The quality, the nature, the purpose, of the proceedings by the Corporation are the same. They have acquired this land, and they can, subject to a proper discretion, determine how much is to be used for making a street, for widening a street or walk, and alter that proportion from time to time. If that is so, then in comes the power of s. 68, which is to be read side by side as a section of the 1875 Act with ss. 154 and 164 of that Act as they were originally passed.

Now it is said against that that the Court ought to be careful to see that the very extensive powers of the Corporation are not misused so that they acquire land for one purpose and devote it to a wholly different one. Our attention has been called to the well known cases of *Attorney-General* v. *Hanwell Urban District Council* (1) and *Attorney-General* v. *Pontypridd Urban District Council.* (2) The *Hanwell* case (1) was one in which land had been acquired for a sewage farm, and then it was attempted to divert it for the purpose of an isolation hospital. In the *Pontypridd* case (2) the land had been acquired for electrical purposes, and it was desired to use a portion of it for a destructor. In argument I pointed out that in the *Hanwell* case (1) those two purposes, the sewage farm and the isolation hospital, enured to the Corporation under two wholly different sections, and indeed Acts; and in the *Pontypridd* case (3) it was pointed out by Romer L.J. that the destructor was not wanted for an electrical undertaking at all. Nothing that I say in this judgment is intended to circumscribe or cut down the authority of those two cases or the principle on which they are founded, but it appears to me that it is quite a different matter to say that when the land has been acquired for what may be called a composite purpose, both purposes being of a like

(1) [1900] 2 Ch. 377.
(2) [1906] 2 Ch. 257.
(3) [1906] 2 Ch. 268, 269.

nature, it is possible to use the authority of those cases to establish the proposition that the discretion of the Corporation as to the quantum of the user of the land can be interfered with by the Court.

On the whole, I am inclined to agree with Mr. Montgomery that what one has to ascertain is, under what power did the Corporation acquire the land? He has called our attention to the observations of Collins M.R. and Romer L.J. in the *Pontypridd* case (1), and it appears to me that that is not a bad test—under what power did they acquire the land? If they acquired it for the purposes of streets and purposes akin thereto, then the principle of the two cases to which I have referred cannot be used to interfere with the Corporation's powers.

In the present case the relators have undoubtedly struck too early. The Corporation have not done more than indicate a determination, which is clearly allowed, of turning this land, or a portion of this shrubbery land, into a parking place, but they realize and they make it plain that before they do so they will have to proceed in accordance with sub-s. 2 of s. 68. When proceedings under that section are commenced it will be open to the objectors to take objection and if necessary to appeal. All that is in no way prevented by this judgment. But what the relators have undertaken to establish is that the powers of the Corporation are so limited, having regard to the purposes for which they acquired the land, that they have no authority whatever under s. 68 even to commence proceedings which will ultimately be heard and determined under sub-s. 2.

It appears to me, for the reasons which I have added to those of Eve J., that the relators cannot substantiate that position and that Eve J.'s order was right, and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. It has been laid down in this Court in the *Hanwell* case (2) and in the *Pontypridd* case (3) that a local authority has no power permanently to apply land which it has acquired for one purpose to another purpose inconsistent with the original purpose. The first question to be determined therefore, and in my judgment the only question, is, for what purpose was the land in question originally acquired by the defendant Corporation ? I think Mr. Montgomery was right in his submission that in the circumstances of this case the only right method of determining that purpose is to ascertain what power or powers the Corporation exercised when it purchased the land. This is borne out in the passages cited by Mr. Montgomery from the judgments of Collins M.R. and Romer L.J. in the *Pontypridd* case. (1) In the present case it is plain that in purchasing the land in question the Corporation acted in exercise of two powers—namely, (1.) the power conferred by s. 154 of the Public Health Act, 1875, and (2.) the power conferred by s. 164 of the same Act. Both powers were exercised in respect of the whole of the land other than the land purchased for the purpose of the post office. That being so, the Corporation purchased the particular piece of land now in dispute for (amongst other purposes) the purposes mentioned in s. 154 of the Act of 1875, and if so, I am of opinion that it has power at any time after the purchase to exercise any powers it may have under and by virtue of that section in respect of the land so purchased, notwithstanding that in the meantime that piece of land may have been laid out under the powers conferred by s. 164. If that be the right view, the Corporation is not threatening to act ultra vires by resolving to take steps to appropriate the piece of land for use as a parking place. It is not for this Court to say how that intention ought to be carried out. It is enough for present purposes that there are ways in which this may be done lawfully. At present the Corporation has done no more than intimate its intention to appropriate the piece of land as a parking place, intending, as I gather, to accomplish that object under s. 68 of the Act of 1925. In my opinion the powers conferred by the last mentioned section

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(1) [1906] 2 Ch. 257, 264, 265, 266.
(2) [1900] 2 Ch. 377.
(3) [1906] 2 Ch. 257.

(1) [1906] 2 Ch. 257, 264, 265, 266.

are vested in the Corporation as a result of its having purchased the land under the powers conferred by s. 154 of the Act of 1875.

For these reasons, which are substantially the same as those given by the learned judge and by the Master of the Rolls, I agree that this appeal fails and ought to be dismissed with costs.

RUSSELL L.J. I am of the same opinion. The argument of the appellant is shortly this, that the land in question (by which I mean the land hatched green on the plan) was purchased for the purposes mentioned in s. 164 of the Act of 1875, and that what the Corporation are proposing to do is to apply it for the purposes mentioned in s. 154, and that that would be an ultra vires act. In my opinion that argument is wrong, and for this reason: that upon the facts and documents in this case the land in question was not bought in exercise only of the powers contained in s. 164; it was bought in exercise of the powers contained in that section and the powers contained in s. 154. It is impossible to assign the particular powers to the particular strip of land. I think that is what the learned judge in the Court below means when he uses in his judgment the expression that it was acquired for "alternative purposes." That being so, I see nothing to prevent the Corporation from using the land hatched green for the purpose of improving Norfolk Street and West Sunniside by turning the land into this street if they are so minded. In those circumstances they have, in my opinion, power, by proceeding under s. 68 of the Act of 1925, to provide a parking place on the site of the land hatched green.

For those reasons I find myself in agreement with the judgment of Eve J., and I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for Attorney-General: *Ward, Bowie & Co., for C. T. Stockdale, Sunderland.*

Solicitors for Corporation: *Sharpe, Pritchard & Co., for H. Craven, Town Clerk, Sunderland.*

W. I. C.

In re WHITE'S SETTLEMENT.

PITMAN *v.* WHITE.

[1929. W. 1954.]

EVE J.
1929
Oct. 15, 30.

Settlement—Construction—Share of Real Estate settled—Power to Trustees to retain or sell with Consent of Tenant for Life—Partition and Apportionment—Whether settled Land or held in Trust for Sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 25, *sub-s.* 4.

By a marriage settlement made in 1882 an undivided share of real estate passing under a will was settled, together with other property belonging to the wife, upon trust either to retain the same in its present condition, or with the consent of the tenant for life during her life, to sell, and after her death to sell at the discretion of the trustees. The settlement contained various powers to the trustees appropriate to the management of real estate, but no power to postpone conversion. In 1906 a partition of the entirety of the estate was effected, and certain hereditaments appropriated and conveyed to the trustees in satisfaction of the undivided share settled. On a summons to determine the question whether the land remaining unsold was settled land or held upon trust for sale:—

Held, that the settlement having been made before the coming into operation of the Law of Property Act, 1925, under s. 25, sub-s. 4, of which it would have created a trust for sale, the question was one of construction, and having regard to the trusts and powers in the settlement for the management of the property as real estate, the land remaining subject thereto was not held upon trust for sale but was settled land.

In re Johnson [1915] 1 Ch. 435 distinguished.

ORIGINATING SUMMONS.

By a marriage settlement dated September 11, 1882, and made between W. A. White of the first part, the defendant O. F. White (then O. F. de Palatiano, spinster) of the second part, and trustees of the third part, a sum of 4000*l.*, a share in residuary real and personal estate, and one equal undivided fourth share in the real estates passing under the will of Major W. H. Hartley were settled upon trusts after the intended marriage of W. A. White and O. F. White either to permit the property to remain in its then present condition, or with the consent of Mrs. O. F. White during her life, and after her death at the discretion of the trustees, to sell the same, and with the like consent and at the like discretion to invest the proceeds of sale and to hold the investments thereof (thereinafter called the "trust fund") upon trust for Mrs. O. F. White during her life, and after her death upon trusts for the benefit of her husband and children. The settlement contained various powers to the trustees to sell, mortgage, partition, exchange and lease the real estate settled, which are fully set forth in the judgment of the learned judge.

There was one child of the marriage, the defendant F. M. J. White. The husband, W. A. White, died in 1889. In 1906 a partition of the estates, a share of which was settled, took place, and certain hereditaments part thereof assured to the trustees. By an appointment made in 1906 Mrs. O. F. White appointed the settled freeholds to the use of the defendant F. M. J. White his heirs and assigns, subject to her own life estate. In 1923 other freehold property was purchased and conveyed to the trustees of the settlement in fee simple upon trust for sale, and in 1925 an exchange of certain freeholds took place. Sales of parts of the settled freeholds had been made from time to time.

The summons was taken out by the plaintiff, one of the trustees, to determine the question whether the remaining freeholds subject to the settlement were settled land or were held upon trust for sale. The defendants were the tenant for life Mrs. White and her son F. M. J. White, the remainderman and the other trustee of the settlement.

Donald Cohen for the plaintiff. The settlement gives a discretion to the trustees either to retain or sell, and this creates a trust for sale. The fact that any sale must be with the consent of the defendant Mrs. White does not prevent or negative the existence of the trust.

F. Baden Fuller for the defendants. The language of the settlement is too indeterminate to constitute an immediate trust for sale: *In re Goodall's Settlement*. (1) Here the primary trust is to retain, or as soon as convenient and with the consent of the tenant for life to sell. At present there is no absolute discretion in the trustees to sell. In *In re Wagstaff's Settled*

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(1) [1909] 1 Ch. 440.

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Estates (1) there was an immediate trust for sale subject to consent.

If the trustees had not exercised their discretion to sell by January 1, 1926, then at and after that date the land remained settled land.

In *In re Johnson* (2) Astbury J. relied for his decision on the existence of an express power to postpone, which implied a previous trust for sale.

Here there is not only no express power to postpone but there are subsequent powers in the settlement, powers of sale, mortgage, partition, exchange and management, which are applicable to real estate only. No conclusion can be drawn from the fact that the draftsman has lumped the whole of the property together into one "trust fund."

Cur. adv. vult.

Oct. 30. EVE J. The question raised upon this summons is whether upon the true construction of the settlement in which the matter is intituled, the freehold property subject to the trusts of the settlement not being property acquired by the trustees and conveyed to them by an indenture of September 29, 1923, is settled land or is held upon trust for sale. The plaintiff is one of the trustees—the first defendant is the other trustee and entitled to a life estate or interest under the settlement and the second defendant is absolutely entitled to the trust property subject to the life estate or interest of the first defendant. The settlement was made on the marriage of the first defendant and there were thereby assured to the trustees a sum of 4000*l.* part of a sum of 25,000*l.* raiseable under the trusts of a term of 500 years in the estates of the Rev. W. H. H. Hartley—the share of the first defendant in the residuary personal estate of her deceased brother and her one equal undivided fourth share in the estates of the said W. H. H. Hartley and in the real estates of Major Hartley upon trust after the solemnization of the said intended marriage that they should either permit the said sum of 4000*l.* and the undivided shares thereinbefore assigned and conveyed or any part thereof to remain in their present condition or should as soon as convenient with the consent of the first defendant during her life and after her death at the discretion of the trustees call in or obtain payment of the said sum and share in the said residuary personal estate and sell the said undivided shares in the said estates or any part thereof respectively either independently of or in conjunction with the person or persons for the time being entitled to or having power to dispose of the other undivided shares of and in the same, and should with the like consent and at the like discretion invest the said sum and the money representing such share in the said residuary personal estate or arising by any such sales or sale as therein mentioned and should stand possessed of the premises thereinbefore assigned and conveyed or the investments representing the same thereinafter called the trust fund and of the annual income thereof upon the trusts therein declared. And it was thereby agreed and declared that it should be lawful for the trustees either independently of or in conjunction with the person or persons for the time being having power to dispose of the undivided shares in the said estates other than the undivided share thereof thereinbefore conveyed or any part of such other undivided shares to raise by mortgage loan or sale of the said estates or any part or parts thereof any sum of money which might be required in addition to the moneys realized by certain sales then already effected, for the purpose of paying off the charges to which the real estate of the said Major Hartley was liable under his will and also any other sum or sums which it might from time to time be necessary or expedient to expend in or about discharging any other liabilities or charges connected with the said sum of 25,000*l.* or the estates or the cultivation improvement farming management maintenance stocking and keeping up of the said estates or any part or parts thereof for repairing and amending and insuring and keeping insured from loss or damage by fire any erections, buildings, and works upon and belonging to the same respectively and for erecting and building any new or other erections buildings or works or for purchasing any cattle horses carts implements or utensils or other necessaries for the cultivation or use of the said estates or any part or parts thereof, it being thereby declared that the introduction of the above proviso was to authorize empower and entitle the trustees to raise, charge, pay out, and discharge out of capital all such payments and charges as would except for the aforesaid proviso have been payable out of the income, it being the intention of the parties thereto that all payments of whatsoever kind or nature in any way in connection with the said estates and trust premises might be paid out of capital instead of income. And it should also be lawful for the trustees to exchange the said estates or any part or parts thereof for any other hereditaments in England or Wales and upon exchange to give or receive money for equality of exchange. And it was thereby agreed that it should be lawful for the trustees to make partition of the said estates or any part or parts thereof respectively with the person or persons for the time being entitled to or having power to dispose of the undivided shares thereof other than the share thereinbefore conveyed and upon any partition to give or receive any money by way of equality of partition and also to raise any money which might be required for equality of exchange or partition by a mortgage or sale of the premises thereby assigned and conveyed or any part or parts thereof to the intent that and it was by those presents expressly agreed and declared that the trustees should in respect of all the matters in that behalf therein mentioned and of all matters whatsoever concerning or relating to the said estates have power to deal and concur in dealing with the same as if they were absolute owners of the shares in the said estates conveyed by these presents without being answerable for any loss or damage which might happen thereby.

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(1) [1909] 2 Ch. 201.

(2) [1915] 1 Ch. 435.

I think that is all that is material in the settlement. In June, 1906, a partition was made of the entirety of the hereditaments and premises whereof the one equal undivided fourth share of the first defendant had been settled and in 1925 an exchange of part of the settled freeholds was effected.

EVE J.
1929
WHITE'S SETTLEMENT, *In re.*
PITMAN *v.* WHITE.

The hereditaments apportioned to the settlor's one-fourth and those received on the exchange were duly conveyed to the trustees to be held by them upon such of the trusts of the settlement as were then respectively subsisting and capable of taking effect.

Reverting now to the primary trust after the solemnization of the marriage, does that impose on the trustees a duty to sell, giving them a discretion as to the manner in which and the time at which the sale is to be made, or is it a provision leaving it to the discretion of the trustees whether they shall sell or not—that is to say a power in the form of a trust giving the trustees uncontrolled discretion whether to sell or not ?

In view of sub-s. 4 of s. 25 of the Law of Property Act, 1925, that " where a disposition or settlement coming into operation after the commencement of this Act contains a trust either to retain or sell land the same shall be construed as a trust to sell the land with power to postpone the sale " the question of construction only affects dispositions or settlements which came into operation before December 31, 1925. In these I should say that prima facie a clause which gives trustees the option either of retaining or selling falls under the second of the two alternatives, and in the absence of controlling context ought not to be construed as an imperative trust for sale with a discretion as to time of sale ; but the discretion should be regarded as one which leaves it open to the trustees to decide whether or no there is to be a sale.

In *In re Johnson* (1) Astbury J. considered the fact that the subsequent trusts were all trusts ordinarily applicable to personal estate and in particular the presence in the will of the ordinary and general power to postpone conversion of any part of the real estate as a sufficient context for construing a devise and bequest of residuary realty and personalty " upon trust either to retain the whole or any part thereof in the same state as at the time of my death or at such time or times and in such manner as my trustee shall think fit to sell call in and convert into money all or any part thereof" as an immediate trust for sale with a power to postpone. In *In re Crips* (1), where the devise and bequest was to allow the residue of the real and personal estate to remain in its state of investment at the death or as and when the trustees should in their absolute discretion see fit so to do to sell or convert the same or any part thereof and where the widow was to receive the income of the residuary estate whether original or substituted, Kekewich J., although expressing the opinion that the clause partook of the character of a power and that there was a good deal in the nature of a power in it, construed it as being "not only in form but in substance" a trust for sale.

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(1) [1915] 1 Ch. 435.

I cannot find any context in the settlement in this case sufficient to control what I regard as the primary meaning of the language. On the contrary, as will be appreciated from the extracts I have made from the deed, it contains numerous provisions which indicate that the settlor contemplated that the realty might be retained unconverted. Accordingly I hold the land to which the summons refers to be settled land.

Solicitors: *Gibson & Weldon, for Pitman & Bazett, Reading.*

(1) (1906) 95 L. T. 865.

H. L. L.

LUXMOORE J.
1929
Oct. 22, 23.

In re J. H. ROBERTSON'S APPLICATION FOR LETTERS PATENT.

[1929. R. 1727.]

Patent—Opposition to Claim of Patentee—Interlocutory Proceedings before Comptroller—Right of Appeal to High Court—Law Officer's Powers—Jurisdiction of High Court—Costs—Patents and Designs Acts, 1907 *to* 1928 (7 *Edw.* 7, *c.* 29; 4 *&* 5 *Geo.* 5, *c.* 18; 9 *&* 10 *Geo.* 5, *c.* 80; 18 *Geo.* 5, *c.* 3), *ss.* 11, 77 *and* 92.

A. having applied for the grant to him of letters patent, the application was opposed by B., who claimed that he was the first and true inventor.

In the course of the proceedings before the Comptroller an order for the discovery and production of documents was made against A. A. thereupon applied by originating summons by way of appeal asking that the order be set aside. At the hearing B. took a preliminary objection to the Court's jurisdiction:—

Held, that the jurisdiction of the Court to entertain the appeal was excluded by s. 11, sub-s. 3, of the Patents and Designs Acts, 1907 to 1928. The provision for appeal to the law officer thereby made includes not only final decisions but interlocutory matters; and this is not affected by s. 77, sub-s. 2, of the Consolidated Patent Acts. The words which put the Comptroller in the same position in all respects as an official referee do not imply any other right of appeal.

ORIGINATING SUMMONS.

The applicant, J. H. Robertson, had applied for a grant to him of certain letters patent in respect of an invention which he claimed to have made. The claim was opposed by one R. Tondeau under the provisions of the Patents and Designs Acts, 1907 to 1928, s. 11, sub-s. 1 (*a*), on the ground that the applicant Robertson obtained the invention, the subject-matter of the application, from him, the opponent; and also that he, the opponent, was the first and true inventor. This the applicant denied.

The matter came before the Assistant-Comptroller, acting for the Comptroller-General, the opponent having applied to the Comptroller for an order for discovery under the Patents and Designs Acts, 1907 to 1928, s. 77, sub-s. 2.

An order for discovery and production of documents having been made against the applicant, J. H. Robertson, he applied by originating summons, directed to the respondent, R. Tondeau, by way of appeal from the Comptroller-General, asking that the said order might be set aside.

Trevor Watson (*G. W. Tookey* with him) for the applicant. The Court has jurisdiction to deal with the appeal. The comptroller is in the same position as an official referee. Therefore there is an implied right of appeal to the Court: see the Consolidated Patents and Designs Acts, 1907 to 1928, s. 77, sub-s. 2; also R. S. C., Order LIX.A, rr. 1 and 4. The jurisdiction also shows that an appeal is to be to the High Court: see s. 92, sub-s. 2, of the Consolidated Acts. The position of an official referee shows that his powers are subject to certain limitations and conditions; therefore the same applies to the comptroller, and any decision of his is subject to the possibility of an appeal to the Court.

Hon. H. Fletcher Moulton for the respondent, R. Tondeau. It is submitted that the Court has no jurisdiction to deal with this appeal. In matters that are in their nature interlocutory the comptroller is not in the same position as an official referee. Before 1919 there was no provision for cases of discovery; the comptroller applied to the law officer: see the Act of 1907, s. 74. Here there is no provision for a formal appeal. Under former Acts, see *Reg.* v. *Comptroller-General of Patents* (1) as to the functions of law officers. These questions should be referred to them. There is no appeal unless expressly given. As to appeals to the Court see Order LIII.A, r. 5. Appeals to the law officers in various cases are specified in the following sections of the Consolidated Acts, s. 3, sub-s. 3; s. 6, sub-s. 4; s. 7, sub-s. 5; s. 8, sub-s. 4; s. 11, sub-s. 3; s. 12, sub-s. 2 (*b*); s. 21, sub-s. 5. The wording of the Act when it says the comptroller is in the same position as an official referee (s. 77, sub-s. 2), does not mean that an order made by him is the same as an order made by the official referee: *Darlington Wagon Co.* v. *Harding & The Trouville Pier and Steamboat Co.* (2)

On the question whether or not these particular proceedings should have been brought by an originating summons, it is submitted that this procedure is incorrect. Apart from any other consideration, it is submitted that the procedure by an originating summons is not the proper way to bring these proceedings before the Court. Order LIV., r. 4B, is the order dealing with the procedure by originating summons. Rules have been made dealing with patent appeals: see the Statutory Rules and Orders, 1920; and by s. 40 of the Consolidated Acts, the law officer may make rules. As to the function of the procedure by originating summons, see *In re Giles.* (1) The matters applicable are distinctly stated in the Order, see Order LIV., r. 4F, and a respondent need not enter an appearance.

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(1) (1899) 16 R. P. C. 233, 240.

(2) [1891] 1 Q. B. 245, 247.

Stafford Crossman for the Comptroller-General. The matter is one of some doubt, but under s. 74 of the Consolidated Acts, the comptroller may apply to a law officer in cases of doubt or difficulty. This particular question however has not been raised before.

Trevor Watson in reply. The comptroller is by statute given the position of an official referee. It is submitted that s. 74 is not applicable; it is a question under s. 77. The full effect is that the comptroller has certain powers in the section of the Consolidated Acts, and he is to exercise them in the same manner and subject to the same restrictions as an official referee. On the question of the procedure by originating summons, it is submitted that the invention of a new procedure is not necessary; the procedure is really analogous to the ordinary procedure by summons. Order LXXI., r. 1A, gives the definition of an originating summons, and s. 92 of the Consolidated Acts is the section under which the applicant comes before the Court in preference to any other tribunal.

LUXMOORE J. This is an originating summons which has been taken out by one John H. Robertson. It is addressed to one R. Tondeau, and asks that an order made by the Comptroller-General of Patents for discovery and production of documents, and for the extension of time for the delivery of declarations in opposition to the grant of a patent, may be discharged. [His Lordship stated the facts as substantially set out above.] I am told that this is the first occasion on which an order of this kind has been made by the Comptroller-General. The applicant, Robertson, appeals from this order. Mr. Fletcher Moulton sought to raise a preliminary objection to the appeal on the ground that there is no jurisdiction in the Court to entertain it, but as the onus was on Mr. Trevor Watson to show that his client is entitled to appeal, I directed him to open his case and to satisfy me that I had jurisdiction to deal with the appeal.

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(1) (1890) 43 Ch. D. 391, 399.

The first question therefore to be determined is whether there is any right of appeal to the High Court or to myself, a judge of the High Court, who is nominated by the Lord Chancellor to deal with such appeals from the comptroller to the Court as are allowed by the Patents and Designs Acts, 1907 to 1928. In order to ascertain whether there is any and what right of appeal from a decision of the comptroller to the Court in the present case, it is necessary to consider the relevant sections of the Patents and Designs Acts, 1907 to 1928. Sect. 11 of the Consolidated Acts provides for the opposition to the grant of letters patent. The opposition is limited to certain particular grounds. It is admitted that in the present case the opposition is grounded on sub-s. 1 (*a*) of s. 11. That section provides that: "Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on any of the following grounds," the first, (*a*), being "that the applicant obtained the invention from him, or from a person of whom he is the legal representative." Sub-s. 2 provides for the decision of the case by the comptroller. Sub-s. 3 provides that the decision of the comptroller shall be subject to appeal to the law officer. This is the only right of appeal conferred by the Act in express terms so far as opposition under s. 11 is concerned. It is argued that this reference to a right of appeal is confined to a final decision of the comptroller, and does not affect any interlocutory decision made by him in the course of opposition proceedings.

The comptroller has power to deal with interlocutory matters which may arise in the course of any hearing before him, including, of course, an opposition under s. 11, and such powers are conferred on him by s. 77 of the Consolidated Acts. Sub-s. 1 of this section provides as to the mode in which evidence is to be given before the comptroller. Sub-s. 2 provides as follows: "In case any part of the evidence is taken viva voce, the comptroller shall, in respect of requiring the attendance of witnesses and taking evidence on oath, and discovery and production of documents, be in the same position in all respects as an official referee of the Supreme Court."

The reference to trial by and conduct of business before an official referee is dealt with in the Rules of the Supreme Court, Order XXXVI., Part VIII., which is the Order dealing with trials. The rules which particularly relate to official referees are those numbered 45 to 55 (*d*) inclusive. Of those rules, r. 49 relates to the attendance of witnesses and the taking of evidence on oath, and r. 50 relates to the discovery and production of documents. Under r. 49, the attendance of witnesses is to be enforced by subpœna, and under r. 50, the official referee's authority as to discovery and production of documents is to be the same as the authority of a judge of the High Court. Order LIX.A provides by r. 1: "There shall be right of appeal from any finding, decision, order or direction and from any judgment entered or signed by leave, order or direction of an official or special referee in any action cause or matter or question or issue referred to him for trial . . . ."; and by r. 4 of the same Order it is provided that: "In the case of an order or decision on the hearing of a summons or other interlocutory application such appeal shall lie:—(*a*) in the Chancery Division to the judge in chambers, ... and such appeal shall be brought by notice in writing to attend before the judge in chambers, ..." and so on.

It is sought to justify the making of the appeal to myself by reference to the provisions of s. 92 of the Consolidated

Acts. That section provides by sub-s. 2: "Where by virtue of this Act a decision of the comptroller is subject to an appeal to the court, or a petition may be referred or presented to the court, the appeal shall, except in the case of a petition for the revocation of a patent under section twenty-five of this Act, and subject to and in accordance with rules of the Supreme Court, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose, ..."

I have referred to all the sections of the Consolidated Acts which I think are material in my view to the present case; and I will now express my view with regard to the effect of those sections. It is admitted that the Consolidated Acts do not in express terms provide for any appeal to the Court in respect of any decision arising under s. 77, sub-s. 2, of the Consolidated Acts; and that if any right of appeal in fact exists, it is inferred by implication from the precise form of the reference in that section to the position of the official referee. Mr. Trevor Watson has argued that the words "the comptroller shall in respect of . . . discovery and production of documents be in the same position in all respects as an official referee . . . ." carry with them by implication a right of appeal to the Court, and that you must in fact construe this provision in this way; the comptroller is to have the like powers as an official referee, the powers of the official referee are subject to the right of appeal to the Court, this is a restriction on the powers of the official referee and, therefore, the comptroller is to have the same restriction on his power. I do not think this is a sound argument. The powers of the comptroller and the official referee are the same—namely, to order or refuse discovery and production of documents. The right of appeal is a right conferred on the parties, and not a restriction on the powers of the tribunal. The power of the tribunal is unfettered; the right or remedy of the party is the right which is given to him and not a limitation on the power of the tribunal. It is to be noticed that the Consolidated Acts state in express terms that there is to be an appeal in every case except in the case of an interlocutory order under

s. 77, if in fact any right is given by that section by implication. This is, I think, a strong argument against any implication of a right to appeal in the particular case. Moreover, the words of the section, although perhaps somewhat ambiguous, are not really apt to confer any right on the party. The words are: "The comptroller shall . . . . be in the same position in all respects as an official referee of the Supreme Court." They are not that the comptroller and the parties are to be in the same position in all respects as if the comptroller were an official referee. Further it would be, in my view, a most capricious and unexpected result to find that while the Consolidated Acts provide for an appeal from the final decision of the comptroller, in the case of an opposition to a grant, to the law officer; that they also provide for an appeal from any decision of the comptroller during the interlocutory stages of the opposition to a different tribunal—namely, the High Court or a particular judge of that Court.

In my view the provision for an appeal from a decision of the comptroller to the law officer contained in s. 11, includes and covers not only the final decision, but also any interlocutory order which may lead up to the final decision; for such interlocutory decisions appear to me to be themselves part of the decision of the whole case. It follows from what I have already said that in my opinion I have no jurisdiction to entertain this appeal.

Mr. Fletcher Moulton, who argued the case for the respondents, besides objecting to the jurisdiction on the broad grounds with which I have just dealt, also took a much narrower point. He said that, even if there was a right of appeal in the present case, there was no right to make an appeal by originating summons. I do not propose to deal with this point, but I mention it because, as at present advised, I should hesitate long before I assented to this proposition. If in fact there is a right of appeal to the Court, but there is no method prescribed for the presentation of that appeal, then so long as the point is brought before the Court fairly, and so that the parties affected have fair and proper notice of it, I do not think that the Court ought to refuse to hear the appeal and dismiss it, because it is in a form which is not prescribed, there being in fact no prescribed form in terms applicable to the case.

In the result I hold that I am bound to refuse to entertain the appeal on the ground that I have no jurisdiction to do so, and in the circumstances there being no jurisdiction to entertain the appeal, I can make no order on the summons. As to the question of costs, owing to my decision that I have no jurisdiction, there may be a doubt if I can deal with them.

Hon. H. Fletcher Moulton. It is submitted that there is jurisdiction in the Court to deal with costs in a case of this kind : see the order of the House of Lords in *Cox* v. *Hakes* (1) ; and also *In re Bombay Civil Fund Act,* 1882 ; *Pringle* v. *Secretary of State for India* (2) ; see also the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50.

LUXMOORE J. I think that I have jurisdiction to deal with the question of costs. The respondent's costs on the summons will be paid by the applicant. The Comptroller-General does not get costs.

Solicitors : *Ford, Lloyd, Bartlett & Michelmore ; Kenneth E. Bartlett, Elliott & Co. ; The Solicitor to the Board of Trade.*

(1) (1890) 15 App. Cas. 506, 547.

(2) (1888) 40 Ch. D. 288.

A. R. T.

FARWELL J.

1929

Nov. 1.

In re THOMAS.

THOMAS *v.* THOMPSON.

[1929. T. 988.]

Law of Property—Transitional Provisions—Undivided Shares—Statutory Trusts—Partition Expedient—How to be effected—Power of Appropriation in Will-settlement unexercisable—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-ss.* 1, 3, *inapplicable—Law of Property* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule—Partition authorized by Court under Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

Sect. 28, sub-s. 3, of the Law of Property Act, 1925, which enables trustees for sale to partition unsold land in cases where the net proceeds of sale have become " absolutely vested " in adult persons in undivided shares, does not apply where those proceeds are only vested in life tenants.

A power of partition in a will-settlement is pro tanto inconsistent with the statutory trusts for sale, and cannot therefore be treated as an " additional or larger " power preserved by s. 28, sub-s. 1, as amended by the 1926 Act Schedule. It is therefore overridden by the statutory trusts.

Bernhardt v. *Galsworthy* [1929] 1 Ch. 549 and *In re Flint* [1927] 1 Ch. 570 applied.

Where partition, though expedient, cannot be effected under any power vested in the trustees by the trust instrument or by law, the Court can confer the necessary power for that purpose under the Trustee Act, 1925, s. 57.

ORIGINATING SUMMONS.

Under the testator's will and in the events that happened his residuary estate (freeholds, leaseholds and investments) was on December 31, 1925, vested in the trustees (viz. his son Frederick, his daughter Constance and another person) upon trust as to one moiety for Frederick absolutely; as to one-fourth for Constance for life and after her death on the usual trusts for her children; and as to the remaining fourth for the testator's daughter Mary for life, and after her death on the usual trusts for her children.

There was the usual accruer clause in default of either daughter's children attaining a vested interest.

The will contained a wide power of appropriation empowering the trustees, with the consent of the majority in number of the testator's adult children and grandchildren for the time being interested in possession or expectancy in his residuary estate, to allot or appropriate specifically any part of his estate (real and personal) in or towards satisfaction of the share or shares of the children or grandchildren in the residuary estate, and to determine the value for such appropriation or allotment accordingly.

Constance was still a spinster, but Mary was married before the will and had six children, one of whom died in infancy, and the other five were still infants.

On January 1, 1926, the Law of Property Act, 1925, came into operation and, owing to the trusts being of undivided shares, the trustees thenceforward held the freeholds and leaseholds upon the statutory trusts for sale, etc.

It was considered highly desirable and beneficial for all parties that the trustees should exercise the power of appropriation, by partitioning the freeholds and leaseholds and by allotting and appropriating the investments.

On May 27, 1929, a specific partition agreement based on a proper valuation of the freeholds and leaseholds was entered into between Frederick, the trustees, Constance and Mary.

Doubts however arose whether the trustees, seeing that they now held on the statutory trusts, could carry the agreement into effect.

On July 4, 1929, the trustees issued this summons, asking:

1. That they might be authorized to exercise :—

(*a*) Their power of appropriation conferred by the will, or alternatively

(*b*) The powers conferred on them by the Law of Property Act, 1925, s. 28, sub-s. 3, or s. 28, sub-s. 1, as amended by the Law of Property (Amendment) Act, 1926, Schedule [1926 Statutes, p. 62], of partitioning the freeholds and leaseholds held by them upon the statutory trusts between the persons beneficially entitled thereto in accordance with the agreement of May 27, 1929.

2. Alternatively if the Court thought that none of these powers were exercisable by the trustees, that the trustees might be authorized and empowered under the Trustee Act, 1925, s. 57, to effect the said partition in accordance with the said agreement.

3. If and so far as necessary administration of the will trusts and the statutory trusts.

Watmough for the trustees. The partition can be effected under the Law of Property Act, 1925, s. 28, sub-s. 3, as the net proceeds of sale have become absolutely vested in undivided shares in Frederick and the two life tenants. The life tenants take absolute, not contingent, life interests. The children's interests are still contingent. The proceeds of sale are throughout the Act treated as the thing in which the beneficiaries are interested. The income of those proceeds is never mentioned: see for instance s. 31, sub-s. 2; s. 35, s. 137, sub-s. 2 (ii.).

[FARWELL J. I should have thought the sub-section referred to the vesting of absolute interests as opposed to mere life interests. The section will no doubt bear either construction, but, read with the rest of the Act, it would seem to apply to absolute as opposed to contingent life interests.]

If however s. 28, sub-s. 3, is not available I rely on s. 28, sub-s. 1, which as amended by the 1926 Act Schedule [1926 Statutes, p. 62] provides that where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the life tenant, statutory owner, or the trustees of the settlement. I agree that powers inconsistent with the statutory trusts are overridden: *In re Flint* (1); *In re Pedley* (2); *Bernhardt* v. *Galsworthy*. (3) But surely the power of appropriation is a mere ancillary power expressly preserved by s. 28, sub-s. 1.

[FARWELL J. A power to partition land in specie is hardly ancillary to a trust for sale.]

If so, the power is gone. But as partition is highly expedient I ask the Court to authorize it under the Trustee Act, 1925, s. 57.

Church for Mary and her children. The partition is certainly expedient.

(1) [1927] 1 Ch. 570.
(2) [1927] 2 Ch. 168, 174.
(3) [1929] 1 Ch. 549.

[FARWELL J. I do not propose to approve the partition agreement, but I will sanction a partition generally under the Trustee Act, 1925, s. 57, if I am satisfied that it cannot be effected under the Law of Property Act, 1925, s. 28, sub-s. 3, or s. 28, sub-s. 1, as amended.]

It is fairly obvious that the net proceeds of sale are not absolutely vested in the life tenants within s. 28, sub-s. 3, and that the power of appropriation, so far as preserved by s. 28, sub-s. 1, is, at all events qua partition, overridden by the statutory trusts.

FARWELL J. [after stating the facts:] Apart from the new legislation the trustees could have acted on their power of appropriation, but the position now is not so easy.

The trustees have tried to persuade me that the case comes within the Law of Property Act, 1925, s. 28, sub-s. 3 (*a*), which provides that where the net proceeds of sale have under the trusts affecting the same "become absolutely vested in persons of full age in undivided shares," the trustees for sale may with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale, partition the land remaining unsold or any part thereof. They contend that the settled fourths are absolutely vested in the respective life tenants who are of full age. It is impossible however to accede to that contention, and therefore s. 28, sub-s. 3, does not apply.

The trustees next contend that the case falls within s. 28, sub-s. 1, which as amended by the 1926 Act Schedule [1926 Statutes, p. 62], provides that where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees shall also have all the additional or larger powers (if any) conferred on them by the settlement.

But the statutory trusts are overriding trusts: *Bernhardt* v. *Galsworthy* (1); *In re Flint* (2); and as the power to partition would pro tanto defeat the overriding statutory trust for sale I cannot hold that it is exercisable.

(1) [1929] 1 Ch. 549.

(2) [1927] 1 Ch. 570.

FARWELL J.
1929
THOMAS, *In re.*
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This therefore being a case where partition cannot be effected under any power vested in the trustees by the trust instrument or by law, I am entitled to consider whether it is expedient and ought to be carried into effect. If so I can authorize the trustees to effect it under the Trustee Act, 1925, s. 57, provided that I am satisfied that it cannot be effected in any other way. That is why I felt bound to express my opinion as to the non-applicability of s. 28, sub-ss. 1, 3.

Now here the evidence justifies me in saying that partition is expedient, and I will confer power on the trustees to make a partition. But I cannot at present approve the particular partition proposed. The trustees can either partition on their own responsibility or come again with full evidence to obtain the Court's approval to this particular partition.

Solicitors: *Phillips & Cummings.*

G. R. A.

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[1929. G. 1446.]

Administration—Intestacy—Lunatic not so found—No Committee or Receiver—Devolution of Real Estate—Liability to debts, etc.—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 51, *sub-s.* 2; *s.* 55, *sub-s.* 1 (*viii.*); *ss.* 32, 33, 34; *Sch. I.*

For six years before her death a lady was a certified patient at a mental home, and without any testamentary capacity. She was not, however, a lunatic so found by inquisition, and never had a committee or receiver. She died at the home on February 1, 1929, a spinster and intestate, aged seventy-six:—

Held, that her real estate went to her heir at law under s. 51, sub-s. 2, of the Administration of Estates Act, 1925, which exemption section, read with the definition section, s. 55, sub-s. 1 (viii.), was not confined to cases where a lunatic or defective had a committee or receiver.

Held, however, that the exemption in s. 51, sub-s. 2, only extended to the devolution of the beneficial interest, and that the real estate must bear its rateable share of the funeral, testamentary and administration expenses, debts and liabilities, under ss. 32, 33, 34 and Sch. I.

ORIGINATING SUMMONS.

On August 15, 1923, a lady (born 1853) was admitted to a mental hospital under an urgency order. The magistrate's order was signed on August 17, and she remained at the hospital as a certified patient until February 1, 1929, when she died a spinster and intestate. During the whole of this period she had no testamentary capacity. She was not, however, a lunatic so found by inquisition, and never had a committee or receiver.

She had no parents or grandparents living, and on May 18, 1929, the plaintiff, a brother of the whole blood, took out administration to her estate, which consisted of a freehold house, subject to a charge of 200*l.*, and 27*l.* personalty. Her funeral expenses and debts, other than the 200*l.* charge, came to 102*l.* The house was sold for 875*l.* and the 200*l.* paid thereout.

On July 4, 1929, the plaintiff issued this summons to determine :—

(*a*) Whether the real estate was held upon trust for the heir at law under the old law, or whether it was held upon the statutory trusts for the brothers and sisters of the whole blood under the Administration of Estates Act, 1925, s. 46, sub-s. 1 (v.).

(*b*) If held upon trust for the heir at law, whether it ought to bear any and what part of the funeral and testamentary expenses and debts.

J. V. Nesbitt for the administrator, who was also one of the next of kin. The question is whether the intestate was a lunatic or defective within s. 51, sub-s. 2, of the Administration of Estates Act, 1925.

Sect. 51, sub-s. 2, provides that "the foregoing provisions of this part (i.e., Part IV.) of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

Then there is a proviso that "for the purposes of this sub-section, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

The question, of course, is whether the proviso confines the sub-section to a lunatic or defective who has had a committee or receiver appointed.

The definition clause, s. 55, sub-s. 1 (viii.), provides that "lunatic" includes a lunatic whether so found or not, and in relation to a lunatic not so found "committee" includes a person on whom the powers of a committee are conferred under the Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; and "defective" includes every person affected by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, as extended by the Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), s. 64, and for whose benefit a receiver has been appointed.

Alchin for the heir at law, who was also one of the next of kin. Lunacy does not necessarily imply a committee or receiver, and the definition clause by using the word "includes" instead of "means" does not limit the ordinary meaning of "lunatic," which clearly includes a person of unsound mind.

The proviso to s. 51, sub-s. 2, does not apply here, as the intestate never recovered her testamentary capacity. It probably means that if she had recovered her testamentary capacity, she would still be within s. 51, sub-s. 2, until her committee or receiver (if any) had been discharged. The object of the proviso is not at all clear, but it certainly was never intended to control the whole sub-section and limit it to a lunatic or defective who had a committee or receiver.

Clifford Middleton for the next of kin generally. The proviso implies that s. 51, sub-s. 2, only applies to a lunatic or defective who has had a committee or receiver appointed. This is borne out by s. 55, sub-s. 1 (viii.), which, in spite of the word "includes," is an exhaustive definition clause. Lunatics and defectives are always treated together throughout the Act.

FARWELL J. [after stating the facts:] Before January 1, 1926, there is no doubt that an intestate's real estate would have devolved on the heir under the old law. That devolution, however, has been altered by the Administration of Estates Act, 1925, and, except in the case of a person of unsound mind, it devolves on the next of kin.

The exception of a lunatic intestate is contained in s. 51, sub-s. 2. [His Lordship read the sub-section and proviso.] In this case the intestate was a lunatic or defective, of full

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age, but by reason of her incapacity, unable to make a will. The next of kin rely on the proviso and contend that s. 51, sub-s. 2, though in other respects applicable, is confined to cases where a committee or receiver has been appointed.

They support their argument by referring to the definition section. [His Lordship read s. 55, sub-s. 1 (viii.).] That section, however, says that lunatic "includes" a lunatic whether so found or not, etc., and prima facie I should have thought that "includes" was equivalent to "means (inter alia)." There is nothing in that definition to confine the word "lunatic" or "defective" to the case where a committee or receiver has been appointed, and the effect is that a person of unsound mind is a lunatic or defective for the purposes of the Act.

Sect. 51, sub-s. 2, therefore applies unless the proviso shows the contrary. That proviso no doubt provides that "for the purposes of the sub-section, a lunatic or defective . . . . shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged." But I do not think those last words can regulate the meaning of the words lunatic or defective throughout the sub-section, as against that in the definition clause. The proviso merely means that a lunatic or defective to whom a committee or receiver has been appointed is not deemed to have recovered his testamentary capacity unless that committee or receiver has been discharged. It has no application to the present case. Sect. 51, sub-s. 2, therefore, applies and the real estate devolves on the heir at law.

The second question was then argued.

J. V. Nesbitt for the administrator. Part IV. of the Act consisting of ss. 45 to 52 deals with the distribution of residuary estate, and from those provisions alone, the intestate's real estate is exempted. Part III. consisting of ss. 32 to 44 and Sch. I., is still applicable, and the heir must bear a rateable proportion of the funeral, testamentary and administration expenses, debts and liabilities under ss. 32, 33, 34 and Sch. I.

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Alchin for the heir. Sect. 51, sub-s. 2, not only alters the devolution under Part IV. and restores the old law of devolution, but it also provides that "that law shall, notwithstanding any repeal, apply to the case." Surely this restores the old law in its entirety—devolution, administration, and everything else.

FARWELL J. In my opinion s. 51, sub-s. 2, only exempts the lunatic's beneficial interest in real estate from the provisions of Part IV. It is only dealing with the devolution of that beneficial interest. It is not dealing with administration of assets, and ss. 32, 33, 34 and Sch. I., throwing the funeral, testamentary and administration expenses, debts and liabilities on the real and personal estate rateably, are still applicable.

Solicitors: *Wrensted, Hind & Roberts.*

G. R. A.

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Oct. 18.

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[1929. T. 393.]

Administration—Direction in Will to carry on Testator's Business of Yacht Broker—Fiduciary Relation—One Trustee not entitled to sever his connection with Testator's Business and compete in similar Business.

By his will the testator who, at the date thereof, was carrying on the business of a yacht broker, appointed the plaintiffs, namely, his daughter B. and one W. and the defendant executors and trustees thereof, and directed them to carry on his business after his death; and in the event of a sale thereof by the executors the whole of the proceeds were bequeathed to B. The testator died on August 1, 1928, and his executors, in pursuance of the directions contained in the will, carried on his business, until February 1, 1929, when, the testator's tenancy of the business premises being about to expire, they removed the business to other premises, a lease of which was shortly afterwards granted to the defendant alone, of which lease to the defendant the plaintiffs did not become aware until a few weeks after the grant thereof, when the defendant claimed the right to hold the lease of the new premises for his own benefit, to exclude the plaintiffs from the new premises and to set up and carry on

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on his own account a business similar to and in competition with the testator's business. The defendant having, since the issue of the writ in the action, assigned the lease of the new premises to B. and the goodwill of the business also having been assigned to her, it became no longer necessary to grant any of the relief claimed and necessary to determine only whether the defendant was entitled at the date of the issue of the writ to the right which he then claimed, for the purpose of deciding how the costs of the action ought to be borne:—

Held, first, that in face of the claim made by the defendant to the benefit of the lease, the plaintiffs were justified in bringing the action, and secondly, that having regard to the special nature of the business of a yacht broker which necessarily involved competition between every individual broker with all the others, it would have been a breach by the defendant of his fiduciary duty towards the beneficiaries under the will, if he had at the date of the issue of the writ set up on his own account an independent business of a yacht broker in competition with the plaintiffs, carrying on their testator's business; with the result that the defendant must pay all the costs of the action.

The principle applied by Lord Cranworth L.C. to the case of a director of a corporation in *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1854) 1 Macq. 461, 471 applied.

ACTION.

Andrew Thomson, at the date of his will, was carrying on the business of a yacht broker in offices on the first floor of Panton House, 25 Haymarket, London. He had for many years been assisted in the conduct of the business by the defendant, Thomas William Allen, who at the testator's death was managing the business for him, but who was under no restriction against quitting his service or setting up a competing business.

By his will made on March 6, 1928, the testator appointed his daughter, Blanche Thomson and A. H. Wyatt (the plaintiffs) and the defendant Allen, executors and trustees thereof, and directed them, or any two of them, to carry on his business during such period as they should think fit, and during the continuance of the business to pay the profits in certain proportions between his said daughter, the defendant and a clerk of the testator's named Hutchings. The will contained a direction that the trustees or any two of them might at any time at their absolute discretion sell the business as a going concern with the goodwill and all the then existing assets, including the leasehold premises upon which it was carried on. Certain options, which were never exercised, were then given in turn to the defendant and the clerk to purchase the business at the absolute discretion of the trustees or any two of them. In the event of a sale of the business by the trustees, otherwise than to either of the persons to whom the said options were given, the whole of the proceeds were bequeathed to Miss Blanche Thomson absolutely.

The testator died on August 1, 1928, and the trustees, in pursuance of the direction contained in the will, carried on the testator's business in the same offices as the testator had carried it on, until February 1, 1929, when, their tenancy being about to expire, they removed the business to offices on the second floor of the same building belonging to the landlord from whom the testator had held the first floor offices. At that time negotiations, which had commenced about two months after the testator's death, were still on foot between the plaintiffs and the defendant for the formation of a private company to take over the testator's business, and, pending those negotiations, the defendant made an offer to his co-trustees to purchase the business, but that offer was not accepted. On February 9, 1929, Messrs. Anstey & Co., the defendant's solicitors, who also acted for the landlords of the business premises, wrote to the plaintiffs' solicitors a letter, stating that the only reason why a lease of the new offices could not be granted to the three trustees was because the defendant would not accept the lease jointly with the plaintiffs, unless satisfactory arrangements could be come to with regard to the future of the business: and that, if satisfactory arrangements could not be made, the defendant would not continue in the business, but would commence business on his own account, and that if it were the intention of the plaintiffs to continue the business, arrangements as to offices must be made independent of the defendant. Eventually, on February 15, 1929, a lease was granted of the second floor premises to the defendant, of which fact the plaintiffs were not aware until March 19, 1929. On that day the defendant's solicitors again wrote to the plaintiffs' solicitors to inform them that the matter of the lease could not be held over indefinitely; that the defendant took the lease with the intention of transferring the benefit of it to the private limited company proposed to be formed; that, in the event of a company not being formed, it was the defendant's intention to retain the lease for his own benefit and to commence business on his own account: further, that it was clear the plaintiffs had no intention of complying with the terms arranged and therefore the tenancy at will which the plaintiffs had would cease on March 22, and the plaintiffs and their employees would be excluded from the premises and the defendant would carry on business on his own account.

On March 20, 1929, in consequence of the claims so put forward by the defendant, the writ in this action was issued in which the plaintiffs claimed a declaration that the defendant held the lease of the new premises as a trustee for the estate of the testator and an injunction to restrain him from excluding or endeavouring to exclude the plaintiffs or either of them, or the servants or employees of the testator's business then carried on by the plaintiffs and the defendant as trustees of the will or from removing or collecting any of the books or assets of the business, and also to restrain the defendant, so long as he continued to be a trustee, from carrying on business as a yacht broker in competition with the business forming part of the testator's estate. However, since the issue of the writ—namely, on June 21, 1929, the lease of the new business premises was assigned by the defendant to Miss Blanche Thomson, and the goodwill of the testator's business was also assigned to her by the three trustees, with the consequence that it became no longer necessary to grant any of the relief claimed, and necessary to determine only whether the defendant was entitled, on the date when the writ was issued, to the rights which he then claimed, for the purpose of deciding how the costs of the action ought to be borne.

An application by motion was made to the Court for an interlocutory injunction, which is more particularly referred to by Clauson J. delivering judgment. At the trial it was not seriously argued that the defendant was entitled to hold the lease of the new premises for his own benefit, and it was admitted by his counsel that, as a fact, at the date of the issue of the writ, the defendant was claiming the right to sever his connection with the testator's business which was then being carried on and to set up a similar business on his own account.

Gavin Simonds K.C. and *Roger Turnbull* for the plaintiffs. The defendant, so long as he remained a trustee of the will and the business was being carried on, was not entitled to set up an independent similar business on his own account. The result of so doing must involve a conflict between the defendant's duty and his interest; nor would the defendant be in any stronger position if he retired from the trusteeship with a view of setting up an independent business: *Wright* v. *Morgan.* (1) It is a hard and fast rule that no trustee shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which may conflict with the interests of those whom he is bound by fiduciary duty to protect: *Aberdeen Ry. Co.* v. *Blaikie Brothers* (2); *Armstrong* v. *Jackson.* (3)

Preston K.C. and *Hugh Rose* for the defendant. The defendant is entitled to carry on a competitive business. At the time of the testator's death, the defendant was in the employment of the testator as manager of his business. He was under no restriction, on the determination of his employment, not to carry on a competing business. Upon accepting the executorship his only duty was to carry on the business and preserve it; any two of the three executors were authorized to carry it on. The asset which it was the defendant's duty to preserve was the goodwill of the business of a yacht broker carried on in competition with all other yacht brokers, including the defendant, if he chose to set up, independently, a similar business. The plaintiffs are, in effect, seeking to enhance the value of that asset at the expense of depriving the defendant of the right to carry on a similar

(1) [1926] A. C. 788, 796, 797.
(2) 1 Macq. 461.
(3) [1917] 2 K. B. 822.

business. Take the case of a solicitor testator who has appointed as his executor one who is himself a solicitor; to maintain that such executor by accepting the office is prevented from himself continuing his profession, seems an extravagant proposition. The fallacy in the plaintiffs' argument lies in the failure to appreciate the peculiar liability of a yacht broker's business to competition by other brokers, including the defendant. The executors of a deceased partner, bound to give effect to his testator's contract, have been restrained from soliciting customers of the firm at the suit of the surviving partner, who had the right to acquire the deceased partner's share: *Boorne* v. *Wicker.* (1)

[CLAUSON J. That decision turned on the duty existing between vendor and purchaser, a duty arising out of contract. Here, the duty arises out of the fiduciary relation existing between the executors and the beneficiaries under the will.]

A vendor is a trustee of the property for the purchaser, who is the real beneficial owner of the property sold, subject to this, that the vendor has the right to protect his own interest as vendor of the property: *Shaw* v. *Foster.* (2) That principle was applied in *Golden Bread Co.* v. *Hemmings.* (3) It was decided in *Farey* v. *Cooper* (4) that a covenant by debtors to aid in realizing the assets did not imply a covenant not to do something which the law allowed the debtors to do, that was, to solicit the customers. A vendor of a business may trade in the same line of business, unless he has bound himself by special stipulation: per Lord Macnaghten in *Trego* v. *Hunt.* (5) Further, the restriction sought to be imported is too wide and would be bad in law.

CLAUSON J. I will not trouble you, Mr. Turnbull. Mr. Andrew Thomson, when he made his will on March 6, 1928, was carrying on business as a yacht agent at offices consisting of three rooms on the first floor of Panton House, No. 25 Haymarket. He was assisted in that business by a

(1) [1927] 1 Ch. 667, 676.

(2) (1872) L. R. 5 H. L. 321, 338.

(3) [1922] 1 Ch. 162, 171, 172.

(4) [1927] 2 K. B. 384, 400, 401.

(5) [1896] A. C. 7, 24.

Mr. Allen and also by another gentleman. Mr. Allen was in no way bound by any covenant or agreement to Mr. Thomson; he was free to leave Mr. Thomson's service at any moment and to open a competing business, if he thought proper. Mr. Thomson made his will on March 6, 1928; he appointed his daughter, Miss Agnes Blanche Dewar Thomson, Mr. Wyatt and Mr. Allen, whom I have mentioned and who is the defendant to this action, to be his executors and trustees. His will contained the following provision: "I hereby authorise and direct my trustees or any two of them to carry on my business of a yacht agent during such period as they may think fit with power for that purpose to retain the capital which shall at my death be employed therein and to resort to my residuary estate for the purpose of paying expenses incurred in connection therewith and with power also to employ managers, agents and clerks and generally act in the conduct of the said business as my trustees or any two of them shall in their absolute discretion think fit and during the continuance of such business I direct my trustees to pay the net profits thereof (after providing for all salaries) as to 50 per cent. to my said daughter Agnes Blanche Dewar Thomson"—that is the lady who was appointed one of the executors—"absolutely as to 40 per cent. thereof to the said Thomas William Allen absolutely (exclusive of any salary he may be entitled to) and as to the remaining 10 per cent. thereof to the said Victor Hutchings (exclusive of any salary he may be entitled to) such net profits to be ascertained" as therein mentioned. There were certain provisions contemplating the possibility of either Mr. Allen or Mr. Hutchings purchasing the goodwill, but if the business was sold otherwise than to Mr. Allen or Mr. Hutchings, in accordance with those provisions, the testator bequeathed the proceeds to Miss Thomson absolutely.

The testator died on August 1, 1928. From and after his death the three executors named in the will proceeded to carry on his business pending the taking out of probate, and in fact the will was proved on December 29, 1928. For some time there were negotiations with regard to the suggestion that the business should be turned into a limited company. It is not necessary that I should deal with the facts relating to that, but in the course of March, 1929, negotiations for that purpose came to an end. I have already stated that the business was being carried on by the testator, and it was in the first instance carried on by his executors, in certain offices on the first floor of the house I have mentioned. It became desirable to surrender the first floor offices and the business was, after a certain period, removed to and carried on by the executors in rooms on the second floor. It appears that Mr. Allen obtained during this period a lease to himself of the rooms on the second floor, in which the business was being carried on by the three executors. The negotiations for turning the business into a company broke down. Mr. Allen claimed, and it was admitted at the Bar that he claimed, to be entitled to treat as his own property the lease of the rooms on the second floor which he had obtained. Accordingly, this action was started, partly for the purpose of establishing that Mr. Allen held the benefit of that lease in trust for the estate, and after going through the correspondence and considering it, it has now become plain that Mr. Allen was wrong in the claim he was putting forward with regard to the lease and that the plaintiffs were justified in starting the action and in claiming that the lease was not Mr. Allen's own property, but belonged to the estate. However, in the circumstances which have supervened, it is unnecessary now to grant the relief claimed in regard to that part of the claim. I am only concerned with it for the purpose of deciding how the costs of it are to be borne. After a little argument it was soon recognized, and I must necessarily hold, that in face of the claim made by Mr. Allen to retain the new lease for his own benefit, the action was properly started, with the result that Mr. Allen must bear the costs of that part of the action.

There is, however, another part of the case which causes greater difficulty with which I will now proceed to deal. At the moment that the writ was issued, Mr. Allen was under the impression that it was within his right at any moment to cease, so far as he was personally concerned, as one of the three executors from carrying on the business of the testator, sever his connection with that business, and himself set up a competing business; nor is it, I think, in dispute—in fact it appears from the pleadings—that he was claiming when the action was commenced, and he still claims, that that was his right. What happened, putting it quite shortly, was this. The action was started with a view not only to deal with the matter of the lease but with a view to restrain the defendant, so long as he continued to be an executor and trustee, from carrying on a competing business. The action having been started, there was a motion before this Court on March 26 for an interlocutory injunction to restrain the defendant from doing that which he claimed to do—namely, from setting up a competing business so long as the testator's business was being carried on by the executors. That motion came before this Court, it came before me personally; I did not at that time see my way to grant the injunction, because I was not satisfied that in that respect the plaintiff had a cause of action against the defendant. The matter was taken on the same day to the Court of Appeal, and the Court of Appeal granted an interlocutory injunction to keep matters in statu quo over the following day, and on the following day, March 27, the Court of Appeal discharged my refusal to grant an injunction and, on the usual undertaking in damages by the plaintiffs, made an order that "the defendant, being an executor and trustee of the will of the above named testator Andrew Thomson, his servants and agents (so long as the business of a yacht agent continues to form part of the testator's estate or to remain subject to the trusts of his will), be restrained until judgment in this action or until further order from carrying on business as a yacht agent or any similar business in Panton House No. 25 Haymarket or elsewhere in competition with the testator's said business or from being directly or indirectly concerned or interested in any such business carried on in competition with the testator's said business as aforesaid." That would seem prima facie to be a decision that there was

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a cause of action and that, there being a cause of action, the circumstances justified the granting of an interlocutory injunction. I am informed, however, although I have not been referred to the shorthand notes of what occurred in the Court of Appeal, that their Lordships made it quite plain they did not intend that their order should be treated as a decision upon the point, they intended to leave it entirely open to the judge at the trial to decide the point of law which arose in accordance with his own view of the law. I accordingly start the case unfettered by any decision upon the point by the Court of Appeal. What has happened since the commencement of the action is that the testator's business has been transferred to the beneficiary Miss Thomson, with the result that the duties of the executors and trustees to carry it on have ceased. In those circumstances, the injunction granted by the Court of Appeal has ceased to operate, and the defendant is, as everybody admits, now free to carry on a competing business. Accordingly the plaintiffs, in respect of this part of the relief claimed in the action, do not now claim any substantive relief. There remains, however, the question of the costs of this action, so far as they relate to this particular matter. It becomes necessary, therefore, for me to decide this interesting and perhaps difficult point of law. The matter I have to decide is this. Is the defendant right or not in the submission which he makes in para. 16 of his defence: " That at all times since the death of the testator or alternatively at all times since his ceasing to take any part in the conduct of the testator's said business the defendant has been and is lawfully entitled (subject to his observance of any restrictions imposed by the general law relative to his solicitation of customers of the testator or otherwise) to carry on or be concerned in the business of a yacht agent competing with that of the testator." If he is right in that submission the action, so far as relates to this matter, ought not to have been started, and the plaintiffs must pay the costs with the further result that, if there was no cause of action, the injunction granted by the Court of Appeal would be one which, in such case, ought not to have been granted, and the defendant would be entitled to an inquiry as to damages for the injury sustained by the granting of the injunction. On the other hand, if the submission of the defendant is incorrect, it is obvious the action was properly started; and the defendant must pay the costs of the action with regard to this matter as well as the costs with regard to the other matter I have mentioned. There therefore arises for my decision this neat point: A testator carrying on the business of a yacht agent appoints an executor and directs him to carry on the business. The executor accepts the position of executor and in fact carries on the business; is that executor at liberty to sever his connection with the business, though it still remains a portion of the testator's estate, and himself start a competing yacht agent's business? The first thing to ascertain is what is a yacht agent's business, and what effect upon the interests of the beneficiary under the testator's will would result from the executor starting a competing business? For that purpose I am assisted by the statement in para. 14 of the defendant's defence, which is in these terms: "The business of a yacht agent or broker is similar to that of a house agent i.e. the yacht agent receives or solicits the order or permission of yacht owners to place their yachts on his books and having ascertained by inquiry or advertisement a prospective purchaser of any particular yacht obtains and submits an offer to the owner and is paid a commission by him if a sale results. The greater part of the yachts for the time being on the market are therefore on the books of all yacht agents and that agent earns a commission on a sale who can first secure a purchaser. Every yacht agent consequently carries on a business which competes with that of every other yacht agent. The business of the testator was of the character of those of all other yacht agents in this paragraph described and the testator had no regular or exclusive connection." I ought to say that in opening this case Mr. Gavin Simonds, for the plaintiffs, said he was not quite prepared to accept that statement as accurate, as he was not prepared to admit that the testator had no regular or exclusive connection. However, no evidence

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was given by the plaintiffs apart from the correspondence, and as against the defendant I am prepared to assume that para. 14 is an accurate statement. I do not think, for the purpose of my judgment, it is very material whether the testator had any regular or exclusive connection or not. Let me see what is involved in Mr. Allen starting a rival business of a yacht agent or broker on his own account. He will proceed to communicate with a yacht owner and he will enter into a contract with that yacht owner the effect of which will be that, if he, Mr. Allen, is fortunate enough to be the yacht agent who is the first to secure a purchaser for the owner of the yacht, he will obtain a benefit in the form of a commission. Now there is no question that as between Mr. Allen on the one hand and the beneficiaries under Mr. Thomson's will on the other, there was in existence, and as to this there is no dispute, a relation of a fiduciary nature; and the point I really have to consider is this: Would it or would it not have been a breach of Mr. Allen's fiduciary duty between himself and the beneficiaries under the will, if he had started at the time of the commencement of the action a new business of a yacht agent and had accordingly entered into such a contract as I have described with a yacht owner who might have entered into a similar contract with Mr. Thomson's executors which would have enabled Mr. Thomson's executors, should they have been the fortunate brokers who were the first to secure a purchaser for the owner of the yacht, to secure a commission?

In order to find the principle I have to apply I turn to the judgment of Cranworth L.C. in the House of Lords in the case of *Aberdeen Ry. Co.* v. *Blaikie Brothers.* (1) This case dealt with a fiduciary relation which arose from the fact that the person concerned in the case was the director of a corporate body. "A corporate body," says the Lord Chancellor, "can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their

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(1) 1 Macq. 461, 471, 472.

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principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into." And further: "The inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party; and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land." A little later on he says: "Mr. Blaikie was not only a director, but (if that was necessary) the chairman of the directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the company." May I translate some portions of this passage into the language which would be appropriate when dealing with a case where the fiduciary relation exists, not because the one party is a director of the other party, but because one party is an executor and trustee who has duties towards a beneficiary under the will of which he is executor and trustee. I find the principle to be this. The rule of universal application is that an executor and trustee having duties to discharge of a fiduciary nature towards the beneficiaries under the will—in this particular case the duty of a fiduciary nature was to carry on the business of the testator to the best advantage of the beneficiaries—he shall not be allowed to enter into any engagement in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. Now if Mr. Allen had set up this competing business and had entered into such an engagement with a yacht owner as that to which I have referred, would he have been entering into an engagement in which he would have a personal interest conflicting or which possibly might conflict with the interests of those he was bound

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to protect? Having regard to the special nature of a yacht agent's business, it appears to me clear that I am bound to answer that question by saying that, by starting such a business and entering into such engagements, Mr. Allen would have been entering into engagements which would conflict, or certainly possibly might conflict with the interest of the beneficiaries under the will, because he would be obtaining for himself chances of earning a commission which, but for such competition, might be obtained for the beneficiaries under the will. It appears to me, therefore, that, if Mr. Allen had set up—he did not, because he was prevented by the injunction granted by the Court of Appeal—a competing business at the time in question, the commencement of the action, he would have been doing something which would have been a breach, as between himself and the beneficiaries, of the fiduciary duties he owed them. I want to add that, in coming to this conclusion, I am, of course, coming to the conclusion only in this particular case on the facts as to the business which Mr. Allen was proposing carrying on and in particular on the position as stated in para. 14 of the defence of a yacht agent and the nature of the business which a yacht agent carries on.

The application of the principle which it appears to me I ought to apply in this case may be a matter of considerable difficulty in certain other cases, instances of which have been put at the Bar. The principle is settled. In this particular case the application seems to me, when one attends to it carefully, to be reasonably plain. Under the circumstances I hold that Mr. Allen, at the time the action was started, had not a right to set up a competing business of a yacht agent competing with that of the testator. In other words I hold that so far as this part of the case also is concerned the action was properly started.

The result will be that the only order I shall make will be that the defendant do pay the costs of the action, no other relief now being claimed.

Solicitors: *Rider, Heaton, Meredith & Mills, for Ticehurst, McIlquham & Wyatt, Cheltenham; Anstey & Co.*

H. C. H.

In re SHAWDON ESTATES SETTLEMENT

AND

In re THE SETTLED LAND ACT, 1925.

EVE J.

1929

Oct. 28;
Nov. 27.

[1929. P. 1118.]

Settled Land—Bankruptcy of Tenant for Life—Assurance of Life Estate to Person next entitled—Refusal of Tenant for Life to execute vesting Deed—"Intent to extinguish the same"—Vesting Order made—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 7, 105.

By s. 105 of the Settled Land Act, 1925, where the estate or interest of a tenant for life under a settlement has been or is absolutely assured, with intent to extinguish the same, to the person next entitled in remainder, the statutory powers of the tenant for life in reference to the property affected by the settlement shall cease to be exercisable by him, and shall be exercisable as if he were dead, without prejudice to incumbrances affecting the estate assured:—

Held, that the operation of the section is not confined to the case of an assurance by the tenant for life himself of his estate, but extends to an assurance by any person in whom the life estate is vested, including a trustee in bankruptcy of the tenant for life. The "intent" referred to in the section is the intent of the assignor.

Where therefore a tenant for life was bankrupt, and his trustee in bankruptcy sold and assured the estate for life to the tenant in tail in remainder, but the tenant for life refused to execute a vesting deed in his favour:—

Held, that the tenant in tail was entitled to a vesting order under s. 12, sub-s. 1 (*a*), of the Settled Land Act, 1925.

ORIGINATING SUMMONS.

By a settlement dated January 27, 1902, and made between William Hargrave Pawson of the first part, Violet Margaret Gaskell of the second part, and the Right Honourable Robert George Canning, Baron Harris, John Jervis Pawson, Thomas Cole Porter and Henry Kershaw of the third part (being a settlement made upon the marriage of William Hargrave Pawson and Violet Margaret Gaskell, certain freehold properties known as the Shawdon Estates in Northumberland and Durham, were limited, after the marriage was solemnized, to the use of W. H. Pawson during his life with remainder to uses for securing a jointure rentcharge to V. M. Gaskell (afterwards V. M. Pawson) during her life, and subject thereto to the use of the trustees for a term of 1000 years for securing portions, and subject to the said term, to the use of the first and other sons of W. H. Pawson by the said V. M. Gaskell or any other wife, successively according to seniority in tail male, with remainders over. The settlement contained certain powers of charging in the event of the remarriage of W. H. Pawson after the death of V. M. Gaskell (which event happened), and other powers in extension of those conferred upon a tenant for life by the Settled Land Acts.

The applicant, William John Hargrave Pawson, was the eldest son of the said marriage, and was born on December 6, 1902. V. M. Pawson died on November 7, 1922. The marriage had been dissolved and both spouses remarried.

On November 7, 1907, W. H. Pawson was adjudicated bankrupt, and A. C. Bourner was appointed trustee of his estate.

By a vesting deed dated November 1, 1926, for giving effect to the transitional provisions of the Settled Land Act, 1925, all the freehold property, subject to the limitations of the settlement, was vested in W. H. Pawson in fee simple, upon the trusts and subject to the powers and provisions thereof.

By a conveyance dated March 21, 1929, A. C. Bourner, as trustee in bankruptcy, in consideration of 4000*l.*, conveyed the life estate of W. H. Pawson to the applicant. At about the same time a vesting deed was prepared for the purpose of enabling W. H. Pawson to vest the legal estate in the settled property in the applicant in accordance with s. 7, sub-s. 4, of the Settled Land Act, 1925, but W. H. Pawson refused to approve the draft and later, to execute the engrossment.

The summons was taken out by the applicant under s. 12 of the Settled Land Act, 1925, for a vesting order, vesting the freehold properties described in the schedule to the summons, being the Shawdon Estates, in the applicant for all the estate and interest therein of William Hargrave Pawson, the respondent to the summons, subject to a charge by way of legal mortgage as to part of the property.

Sir Thomas Hughes K.C. and *Church* for the applicant. The application is made under s. 12 of the Settled Land Act, 1925, on the ground that the tenant for life has refused to execute a vesting deed to vest the property in the tenant in tail. The estate of the tenant for life having passed to his trustee in bankruptcy and having been assigned by the trustee to the person next entitled, that person becomes for all purposes the tenant for life. The case comes exactly within s. 105, which is an exception to the general rule contained in s. 104, that the powers of a tenant for life are not assignable. Sect. 105 was introduced to get over the decision in *In re Lord Wimborne and Browne's Contract* (1), which held that a tenant for life could part with his life estate, and yet retain all his powers. There has here been an assurance of the life estate with intent to extinguish the same within the meaning of s. 105 of the Act.

Lionel Cohen K.C. and *R. J. T. Gibson* for the respondent. On the construction of s. 105 contended for by the applicant, he would be entitled to a vesting order, but it is submitted that it is incorrect. The intent to extinguish the estate or interest of the tenant for life must refer to the intention of the tenant for life himself and not that of any assignee from him. The section is intended to deal with voluntary surrenders by a tenant for life who might be willing to give up the property, but desired still to retain the powers.

The construction contended for is opposed to the express language of s. 104, sub-s. 1. The scheme of the Act is that the trustee in bankruptcy of a tenant for life is to have no control over the statutory powers. Under s. 19, sub-s. 4, a person who is tenant for life is to be deemed to be such notwithstanding any assignment, including any assignment by operation of law, except one which extinguishes his estate or interest. The trustee cannot transfer the powers to the next tenant in tail by inserting the words " with intent to extinguish the same " in the conveyance. Only the tenant for life himself can extinguish his powers.

(1) [1904] 1 Ch. 537.

[EVE J. referred to Wolstenholme and Cherry's Conveyancing Statutes, vol. ii., p. 252.]

H. S. G. Buckmaster for the trustee in bankruptcy of the tenant for life supported the argument for the applicant.

Wynn Parry for the trustees of the settlement.

Sir T. Hughes in reply. The words "with intent to extinguish the same" refer to the intent of the person assigning, and were introduced to exclude cases where there would otherwise be a merger.

Cur. adv. vult.

Nov. 27. EVE J. By this summons, the applicant, Mr. William John Hargrave Pawson, claiming in the events which have happened to be tenant for life within the meaning of the Settled Land Act, 1925, under the trusts of the settlement in the matter of which the summons is intituled, is applying for an order that the freehold properties specified in the several parts of the schedule annexed to the summons, and all other (if any) the premises capable of being vested by such order which are now by any means subject to the trusts of the settlement may vest in the applicant for all the estate and interest therein of the respondent William Hargrave Pawson upon the trusts and subject to the powers and provisions upon and subject to which under the settlement or otherwise the same ought to be held from time to time, but subject as to certain parts thereof to a legal mortgage of April 17, 1928, more particularly referred to in the summons.

The circumstances in which the summons has been issued are as follows:—The settlement, which is dated January 27, 1902, was made on the occasion of the marriage of the respondent William Hargrave Pawson with Miss Violet Margaret Gaskell, and the property thereby settled was limited after such marriage to the use of the said respondent during his life with remainder to uses for securing a jointure rentcharge to the said Violet Margaret Gaskell (which failed by reason of her death in 1922) and subject thereto to the trustees thereof for a term of 1000 years for securing portions for the younger children of the said marriage and subject to the said term to the use of the first and other sons of the said marriage successively according to seniority in tail male with divers remainders over, and the trustees thereof were thereby appointed to be trustees for the purposes of the Settled Land Acts, 1882 to 1890.

The applicant is the eldest son of the marriage and was born on December 6, 1902. His father was adjudicated a bankrupt on November 7, 1907, and Arthur Charles Bourner was duly appointed the trustee of his estate and effects.

By a vesting deed dated November 1, 1926, and made between the respondent John Jervis Pawson and George Kershaw, the then trustees of the settlement, of the one part, and the respondent William Hargrave Pawson of the other part, the said trustees declared that all the property remaining subject to the limitations of the settlement, was vested in the said William Hargrave Pawson in fee simple that he should stand possessed thereof upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time, that the said John Jervis Pawson and George Kershaw were the trustees of the settlement for the purposes of the Settled Land Act, 1925, and that additional or larger powers were conferred by the settlement in relation to the settled property, and by virtue of the Settled Land Act, 1925, operated and were exercisable as if conferred by that Act on a tenant for life.

Early in the present year the applicant agreed with the trustee in bankruptcy to purchase the life estate in possession of the bankrupt in the settled property, subject to the several incumbrances thereon created by the bankrupt, for the sum or price of 4000*l.*, and by a conveyance dated March 21, 1929, and made between the said Arthur Charles Bourner of the first part, the said John Jervis Pawson and George Kershaw of the second part, and the applicant of the third part, the said A. C. Bourner as trustee in consideration of the sum of 4000*l.*, then paid to him by the applicant, conveyed to the applicant all the settled property for the residue of the life of the respondent William Hargrave Pawson with intent to extinguish the said life estate therein of the said respondent and so as to vest in the applicant the statutory powers of the said respondent under s. 105 of the Settled Land Act, 1925, but subject and without prejudice to the various mortgages specified in the second schedule thereto, to any other incumbrances affecting the said life estate and to the rights to which any incumbrancer would have been entitled if the powers conferred by the Settled Land Act, 1925, as amended had remained exercisable by the said respondent.

The applicant contends that under s. 105, as amended by s. 7 of the Law of Property (Amendment) Act, 1926, the statutory powers of the bankrupt respondent under the Settled Land Act, ceased to be exercisable by him on the execution of the last mentioned deed and became exercisable by the applicant as tenant in tail in possession under the settlement, and that by virtue of sub-s. 4 of s. 7 of the Act, the respondent thereupon became bound to convey the settled land to him by a vesting instrument. Accordingly the draft of a vesting deed, for the purpose of conveying to the applicant the legal estate in fee simple in the settled property, was submitted several months ago to the respondent; but he has refused and still refuses and neglects to execute the same, maintaining that he has never had any desire or intention of giving up or extinguishing his statutory powers as tenant for life and is still competent to exercise them, and it is in this position of affairs that the applicant now asks for a vesting order under s. 12 of the Act.

Sect. 105, sub-s. 1, as amended, is in these terms: "Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same, either before or after the commencement of this Act, to the person next entitled in remainder or reversion under the settlement, then, if and when such remainderman or reversioner would, if the tenant for life were dead, be or have the powers of a tenant for life under this Act, the statutory powers of the tenant for life under this Act shall, in reference to the property affected by the assurance, and notwithstanding the provisions of the last preceding section, cease to be exercisable by him, and the statutory powers shall thenceforth become exercisable as if he were dead, but without prejudice to any incumbrance affecting the estate or interest assured, and to the rights to which any incumbrancer would have been entitled if those powers had remained exercisable by the tenant for life." And by sub-s. 2: "In this section 'assurance' means any surrender, conveyance, assignment or appointment under a power (whether vested in any person solely, or jointly in two or more persons) which operates in equity to extinguish the estate or interest of the tenant for life, and 'assured' has a corresponding meaning." That the conveyance of March 21, 1929, so operated is clear—see s. 103, under which the estate vested in the trustee is an equitable one—and the argument based on s. 104 whereby the powers of a tenant for life under the Act are declared incapable of assignment or release, and as not passing to a person being by operation of law or otherwise an assignee of a tenant for life, is disposed of by the express language, whereby s. 105 is to operate notwithstanding the provisions of the last preceding section. It is, I think, clear that on an assurance by way of surrender or otherwise to the next remainderman made by the tenant for life with intent to extinguish his estate the powers conferred by the Act upon the assignor would cease to be exercisable by him and become exercisable by the assignee.

I gather from the attitude of the respondent that he takes the view that the operation of s. 105 is limited to cases where the intent to extinguish the estate is the intent of the life tenant and that the section does not apply when the assurance is by an assignee, such as a trustee in bankruptcy, but I cannot read the section as so restricted. Had such been the intention the opening sentence might have been expected to have read somewhat as follows: "When the tenant for life under the Settlement absolutely assures his estate or interest with intent to extinguish the same," but the wording is quite general and it is difficult to detect any limitation affecting the assignor; the assignee must be the person next entitled in remainder or reversion under the settlement, but the

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assignor—the individual entitled to express the intent—may be any one in whom the life estate is vested. The particular assignee must in most cases be the purchaser most likely to give the best price for the interest in that the assurance can in his case include the statutory powers, and I cannot see any sufficient grounds for holding that the trustee in bankruptcy cannot avail himself of the section. In my opinion, therefore, the applicant is entitled to the vesting order he asks for.

Solicitors: *Beachcroft, Hay & Ledward; Oliver Richards & Parker.*

H. L. L.

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plied. *Re* EASTES. [1948] 1 All
. 536. Also [1948] 1 Ch 267.

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July 18.

In re BAIN.

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[1928. B. 518.]

Will—Construction—Charitable Bequest—Gift to Vicar of St. Alban's Church "for such objects connected with the Church as he shall think fit"—Trust vested in Vicar for time being—Validity.

A testatrix made a residuary bequest "unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit":—

Held (Russell L.J. dissenting), that the bequest, which was admittedly to the Vicar as holder of his office on trust, was a valid charitable bequest, as on the true construction of the words "for such objects connected with the Church as he shall think fit" the discretion vested in the Vicar must be exercised within the scope of church and not parochial purposes.

Decision of Eve J. reversed.

APPEAL from Eve J.

By her will dated May 29, 1909, Caroline Margaret Boswell Bain, after bequeathing certain specific legacies and making bequests of her share and interest in any money belonging to her in the Nailstone Colliery, devised and bequeathed all the residue of her estate whatsoever and wheresoever "unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit."

The testatrix died on July 10, 1909, and her will was proved on September 3, 1909. Owing to difficulties in realizing the testatrix's interest in the Nailstone Colliery, Bagworth, the administration of her estate was greatly delayed and the expenses of administration rendered considerably greater. After the payment of these expenses and of the legacies, the residue was found to be insufficient to pay the whole of the estate duty. In July, 1926, the trustees of the testatrix's will learned that under the will of her father she had become entitled, in the events which had happened, to about 2500*l.* Out of this sum, death duties were in course of being satisfied, and it was anticipated that a sum of about 2000*l.* would remain as residue.

The defendant, the Reverend H. Ross, was the present Vicar of St. Alban's Church, Brooke Street, Holborn. An originating summons was taken out by the Public Trustee asking (inter alia) (1.) whether the gift of residue in the testatrix's will was upon the true construction of the will (*a*) a gift to the person who was at the date of the testatrix's death Vicar of the said church, or (*b*) a gift to the Vicar for the time being of the said church; and (2.) whether in alternative (*a*) the gift had failed by reason of the said Vicar's death or was a good charitable gift, and in the latter event by whom the objects to which the gift was to be applied should be selected.

Eve J. said that the first question he had to determine was whether the residuary gift was a gift to the individual or to the holder of the office for the time being. In his opinion it was a gift to the holder of the office and created a trust for such objects connected with the church as the holder should think fit. First it was said that these objects were the maintenance of the fabric of the church, but he (his Lordship) could not accept that view. Secondly, it was said that the language was equivalent to or at any rate ought to receive the same construction as would be given to the expression "for religious purposes." These were not, however, the terms of the gift. He had no real knowledge of what objects were connected with the particular church.

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It might be, as had been argued, that the church (which he believed belonged to the Anglo-Catholic body) might be engineering an agitation against this or that revised Prayer Book. There was nothing in the language of the gift to indicate that the objects for which the residue was to be held were necessarily charitable. He (his Lordship) was not prepared to say that the objects were so limited by the expressions used in the will as to exclude objects which were not of a charitable nature. In these circumstances he came to the conclusion that the gift failed.

The Vicar appealed.

On the appeal an affidavit by the Vicar was read by leave of the Court for the purpose of giving information as to the objects connected with St. Alban's Church, and it stated (clause 3) that the offertories for general church expenses and other general income applicable for purposes in connection with St. Alban's Church were applied (i.) in maintaining the music of the church by paying the salaries of an organist and an assistant organist and the expenses of the hydraulic blowing and tuning of the church organ; (ii.) in doing the necessary repairs to the fabric of the church; (iii.) in lighting and heating the church; (iv.) in paying the salary of a verger; (v.) in insuring the church against fire and burglary; (vi.) in paying for certain essentials of the church services; and (vii.) in defraying certain miscellaneous expenses of small amount. In clause 3 it was stated that in addition to general church expenses, there were in connection with St. Alban's Church certain other purposes or objects of which the accounts were distinct from the churchwardens' accounts. These were the St. Alban's District Mission House, the income of which went to maintain the Mission House and to give assistance to poor parishioners, the St. Alban's Nursery, where young children of poor parents were looked after while their parents were away at work, the St. Alban's Schools Emergency Fund, used for painting and repairing schools connected with the church, St. Alban's Men's Club, a branch of the Clewer Sisterhood, a community which gave services without payment to the poor, a Church Magazine Fund, a

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choir fund, the Mackonochie Chapel Fund, and the St. Alban's Missionary Association,

It was admitted on the appeal that the residuary gift was to the Vicar as holder of the office upon trusts.

Norman Daynes for the appellant. The question is whether the gift to the Vicar of St. Alban's Church for such objects connected with the church as he shall think fit is a valid charitable gift on its true construction. The church with which the objects are to be connected is the particular building.

The Court ought to have regard to the existing objects connected with the church in considering whether the gift is charitable, and an affidavit has been sworn setting them forth.

[RUSSELL L.J. Is not the question whether any non-charitable object is within the terms of the trust ?]

In *In re Kenny* (1) evidence was admitted to show that the missionary works engaged on by the legatee were charitable in a gift to him for missionary purposes : see also *In re Rees.* (2) The objects here are not those connected with the parish but those connected with the church. These can only have regard to the maintenance of the fabric of the church and the services held in it. The gift is for religious purposes and is therefore charitable : see *In re Garrard* (3), and compare *Thornber* v. *Wilson* (4), where it was held that a gift to a minister as such was a good charitable bequest, and *In re White.* (5) The gift is to a religious institution, and if it be applied to objects of that institution, it must be a charitable gift : *Bruce* v. *Presbytery of Deer* (6) ; *In re Williams.* (7) The cases mainly relied on by the other side are *In re Davidson* (8) and *Dunne* v. *Byrne.* (9) *In re Davidson* (8) is distinguishable, for the objects cannot be limited to charitable purposes when the testator has given a power of selection between "charitable religious or other societies." In *Dunne* v. *Byrne* (1) the expression used was conducive to the good of the diocese, which was clearly too wide.

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(1) (1907) 97 L. T. 130.
(2) [1920] 2 Ch. 59.
(3) [1907] 1 Ch. 382.
(4) (1858) 4 Dr. 350.
(5) [1893] 2 Ch. 41.
(6) (1867) L. R. 1 H. L. Sc. 96.
(7) [1927] 2 Ch. 283.
(8) [1909] 1 Ch. 567.
(9) [1912] A. C. 407

To sum up, a gift to the Vicar as the holder of his office would be charitable but for the words for "objects connected with the Church." These cannot be used to extend the prima facie charitable objects but as cutting down the objects for which the Vicar could otherwise have applied the gift. On the true view "connected with the Church" means connected with the fabric of, or services in, the church.

Stafford Crossman for the Attorney-General supported this argument and referred also to *In re Scowcroft.* (2)

J. N. Gray for the Public Trustee.

Belsham for the next of kin. It is immaterial how the church funds are in fact being applied. The whole question turns on the meaning of the words "objects connected with the Church" and they are too wide for the gift to be charitable. It is not possible to say that the phrase is synonymous with "for religious purposes." The Vicar's affidavit shows what are the objects connected with the church at the present time, and is it not reasonable to suppose that these are the objects the testatrix had in mind? If so, the gift is far too wide. This case is exactly like *Dunne* v. *Byrne.* (1) There the word used was "conducive" and here "connected with." Some objects coming within the ambit of the words would not be charitable, for it covers the purely philanthropical activities of the church. If that be so, the gift is bad. The question reduces itself to a very narrow one of construction. There is no ambiguity in the words entitling the Court to give them a benevolent construction. The objects are clear, and are so wide that the gift fails. *In re Kenny* (3) and *In re Rees* (4) have no bearing on this case. Nor does *In re Garrard* (5) assist, for here the trusts are designated. *In re White* (6) was mentioned in *Dunne* v. *Byrne* (1) with doubt by Lord Macnaghten. As Russell L.J. said in

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(1) [1912] A. C. 407.
(2) [1898] 2 Ch. 638.
(3) 97 L. T. 130.
(4) [1920] 2 Ch. 59.
(5) [1907] 1 Ch. 382.
(6) [1893] 2 Ch. 41.

In re Grove-Grady (1), matters have been stretched in favour of charities almost to bursting point. "A decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another."

Norman Daynes replied.

LORD HANWORTH M.R. This is an appeal from Eve J., who gave judgment on March 7 on the construction of the will of Mrs. Caroline Margaret Boswell Bain. [His Lordship stated the facts and continued:] A dispute arose whether the direction as to residue was good or bad, and this summons came before Eve J. for the determination of that question. Eve J. decided that the words in the will dealing with residue were ambiguous and uncertain and therefore that the bequest of the residue was void. The words disposing of the residue are these: "I devise and bequeath all the residue of my estate whatsoever and wheresoever unto the Vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the Church as he shall think fit." Eve J. has held that "objects connected with the Church" are so wide and vague that they may fall far outside any religious purposes, and thus that no trust could be executed in respect of them and therefore that the bequest is void. He says there is nothing to make the objects connected with the church necessarily charitable. The appeal has been argued before us and it has the support of the Attorney-General, who by Mr. Stafford Crossman has added to the argument in support of the appeal.

The question lies in the narrowest possible compass, as has been rightly said by Mr. Belsham. We have to put a construction on these words, guided of course by rules which have been laid down. It is quite clear that if the words to be interpreted are such that it is impossible to give anything but a wide interpretation to them, that interpretation must be given, with the result that the bequest is void. As an illustration of that I refer to two cases. In *In re Davidson* (2)

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(1) [1929] 1 Ch. 557, 582.

(2) [1909] 1 Ch. 567.

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there was "a residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects . . . as he shall in his absolute discretion think fit," and it was held that the bequest was not a good charitable bequest but void for uncertainty. Farwell L.J. says (1) with great cogency that inasmuch as the testator had himself specified the special objects, charitable, religious or other societies, and dissociated the one from the other, it was not possible for him, when the testator had so distinguished between charitable and religious societies, "to say that by religious societies he means only such as are charitable and does not mean to extend the gift to the wider area" which he had himself mentioned. Equally in *Dunne* v. *Byrne* (2) it was held that a bequest failed for similar reasons, the terms of the bequest being "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese." Those words obviously show that the objects were some which were conducive, and in that sense stood outside the immediate religious purposes.

On the other hand, the proposition is not disputed that, where possible, a construction ought to be given to the terms of a will which will enable it to be upheld. Thus in *Bruce* v. *Presbytery of Deer* (3) Lord Chelmsford L.C. said: "When it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted." I cite that to show that the Court ought not to be astute or officious to try and find some means of rendering the words of the bequest of no effect. Then in *In re White* (4) there was a bequest to "the following religious societies" with a blank after these words which was not filled up. The Court came to a conclusion which has been

(1) [1909] 1 Ch. 567, 572.
(2) [1912] A. C. 407.
(3) L. R. 1 H. L. Sc. 96, 97.
(4) [1893] 2 Ch. 41, 52.

somewhat criticized by Lord Macnaghten in a later case, but what Lindley L.J., whose words are always worthy of attention, said on this very question of how the words of a will ought to be interpreted was as follows: "It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies; but what for? The only rational answer to this question must, we think, be 'for the purposes of these societies'; and the societies being themselves described as 'religious societies,' the purpose for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily 'charitable' purposes, and in a particular case a 'religious' society may be shown not to be a 'charitable' society." Then he cites in reference to that the well known case of *Cocks* v. *Manners* (1), and goes on: "But the authorities shew that a bequest to a religious institution, or for a religious purpose, is prima facie a bequest for a 'charitable' purpose, and that the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose."

With those cases before me and with those rules to apply, I have to come to a conclusion as to the proper interpretation to be given to the words of the bequest in the present case. The words that we have to construe are "for such objects connected with the Church." Now be it observed that the testratrix does not refer in any way to the Parish of St. Albans. The centre of thought appears to be the church. It is not disputed before us, nor was it in the Court below, that the bequest was to the vicar virtute officii. It was not a personal bequest, and it is not disputed that the Vicar takes as trustee. We have to see whether he can take at all, and it is said that he cannot. He would in exercise of the discretion given to him have power to decide on the objects for which he would dispose of the funds, for I think the words "as he shall think fit" give him a discretion, but only a discretion within the field marked out by the previous words. It comes to this, that the bequest is to the Vicar as the Vicar of St. Alban's Church and not St. Alban's Parish for objects connected with the church. I quite agree that if one allows one's mind to play over the objects which are parochial and illustrative of wide activities, such as are common to a great number of parishes, a loose interpretation can be given to these words embracing activities which could not be properly considered religious, and therefore an interpretation covering such a wide field as to prevent the bequest standing good. But having regard to the words of Lindley L.J. that I have cited, is it right to try and find an interpretation for these words which might be given to them by the person called the man in the street, or ought we to construe them in the strict grammatical sense ? It appears to me that the words " such objects connected with the Church," that is the Church of St. Alban's, are to be interpreted narrowly or rather, perhaps, as relating to the church in contradistinction to relating to the parish ; and it is not disputed that if the objects were confined to the support of the church, its fabric and its services, that would be a good charitable bequest. I see no reason to import into " objects connected with the Church " parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the Vicar.

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(1) [1871] L. R. 12 Eq. 574.

I have come to the conclusion that if we were to give a loose interpretation to the words " objects connected with the Church " we should be violating the rule which requires us to make an effort to give an effective interpretation to the testatrix's words ; and I also think that we should be importing from outside something into those words which they do not necessarily convey. It is because we have got the church as the centre of this bequest and not the parish that I think we are right in rejecting outside considerations and in saying that this is a good bequest to the Vicar as a trustee for the purposes of his church, that is, for the fabric and for the services which are conducted therein.

I may say that I have come to this decision not without some hesitation, because I find I am in disagreement with Eve J., to whose experience I would naturally wish to give due weight, and also with my brother Russell L.J., for whose opinion I have the very greatest respect. The appeal will be allowed.

LAWRENCE L.J. I agree. The bequest in question is to the Vicar of St. Alban's Church as an ecclesiastical corporation, and it is therefore a gift to a religious institution. Prima facie, such a gift is a bequest for a charitable purpose, Lindley L.J. in delivering the judgment of the Court of Appeal in *In re White* (1) said: "The authorities shew that a bequest to a religious institution, or for a religious purpose, is prima facie a bequest for a 'charitable' purpose, and that the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose." It is true that Lord Macnaghten in *Dunne* v. *Byrne* (2), after stating that in *In re White* (1) Kekewich J. had held a gift "to the following religious societies, viz.:—" to be void and that the Court of Appeal had held it to be a valid charitable bequest, said: "Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that 'a religious society may or may not be a charitable society in the sense in which that expression is used.'" This passage, however, does not show that Lord Macnaghten doubted the correctness of the law as stated by the Court of Appeal in *In re White* (1) but only expressed a doubt whether it was rightly applied to the facts of that case.

(1) [1893] 2 Ch. 41, 52.

(2) [1912] A. C. 407.

The question then arises, there being here a gift which is prima facie a bequest solely for charitable purposes, whether the addition of the words "for such objects connected with the Church as he shall think fit" operates to convert the gift into a bequest for purposes which include non-charitable purposes. The answer to that question depends upon the true meaning of the words "objects connected with the Church." I read the additional words as meaning "for such Church purposes in connection with St. Alban's Church as the Vicar shall think fit." The discretion vested in the Vicar is in my judgment limited to directing the mode of application of the bequest within the scope of the indicated church purposes, which are described as "objects connected with the Church." The cases where the gifts were for purposes conducive to the good of a religion or to the good of a particular church are in my opinion distinguishable from the present case. Here the words, to my mind, are apt and proper to describe objects which are directly connected with the church in contradistinction to objects which are only conducive to the welfare of the parishioners, or to the congregation who attend the church; and I think that the words in question do not have the operation of extending and thus defeating the primary gift to the ecclesiastical body. The facts of this case resemble somewhat closely the facts in *In re Garrard.* (1) There the gift was to the Vicar and Churchwardens for the time being of Kington "to be applied by them in such manner as they shall in their sole discretion think fit." The words gave the widest power as to the application of the bequest, but Joyce J. held that they merely directed that the particular mode of application within the charitable purposes of the legacy should be settled by the Vicar and Churchwardens. Applying that decision to the words in the present case, I hold that they merely direct that the particular mode of application within the chartiable purposes of the bequest in the present will is to be in the discretion of the Vicar of St. Alban's Church.

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(1) [1907] 1 Ch. 382.

I therefore agree that the appeal should be allowed and that a declaration should be made that the gift is a valid charitable bequest.

Russell L.J. I hold the contrary view, and I need hardly say that I differ from the Master of the Rolls and Lawrence L.J. not only with regret but with diffidence; but having formed the view that Eve J. was correct in the conclusion at which he arrived, I feel bound to state my reasons.

The gift here is a very short one. It is "to the Vicar of St. Alban's Church, Brooke Street, Holborn, London, E.C., for such objects connected with the Church as he shall think fit." There is no difference of opinion amongst us that that is a gift to the Vicar of St. Alban's Church, Brooke Street, for such object connected with St. Alban's Church, not with the church at large, as he shall think fit. Further, I think there is no difference between the members of the Court upon any question of principle. It is common ground that if this be a gift which gives the Vicar a power of selection in the exercise of which he could select an object which was not charitable, the whole gift is bad, even though he might in the exercise of his discretion apply the whole fund to objects strictly charitable. The difference of opinion which has arisen in this Court is purely upon the question of construction and nothing else. Speaking for myself I have derived no assistance from any of the authorities which have been cited. There has been no case cited which is in my opinion near the present one. Two of the cases cited to us are *In re Delany* (1) and *In re Rees.* (2) In *In re Delany* (1) the phrase to be construed directed that the fund was to be applied for missionary objects, and in *In re Rees* (2) "for missionary purposes." All that those cases decided was that, whereas the phrase "missionary objects" or the phrase "missionary purposes" without a context would include objects both charitable and non-charitable, in the particular documents in question there was sufficient context, when all the relevant

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(1) [1902] 2 Ch. 642.

(2) [1920] 2 Ch. 59.

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facts were known, to confine the meaning of these phrases to charitable objects. I get no assistance from either of those cases in dealing with the present question. *In re Garrard* (1) was a case which, I venture to think, was looked upon with some doubt in this Court in *In re Davidson.* (2) What was decided in *In re Garrard* (1) was that where there were no words purporting to define or limit the objects to which the gift applied, the good charitable gift survived and the whole gift was charitable. *In re White* (3) is of no relevance here at all. In *In re Williams* (4), which was a decision of Clauson J., the only question was whether under clause 12 of the will, the persons there mentioned could authorize the application of the fund to non-charitable objects, and it was held upon the construction of the words of that will that they could not, and accordingly that the good charitable gift created by clause 5 of the will survived and remained. These are the only cases cited in favour of the present appellant. From the two cases cited as being in favour of the respondent, *In re Davidson* (2) and *Dunne* v. *Byrne* (5), again I get no assistance. They were cases dealing with wills phrased in different language.

I now turn to the words in the present will. In my opinion the natural meaning of the words used by the testatrix is that she wishes the fund to be applied to some or all of the various objects run by or under the ægis of the Church of St. Alban's. That seems to me, so far from being a loose construction of the words used, to be their natural construction, and I see no justification upon the general contents of this will, or upon any other ground, for cutting these words down so as to confine the objects to objects which my Lords have described either as repair of the fabric of the church, or expenses in connection with the church services, or church purposes generally. It appears to me that to give that meaning to the words used would be to substitute different language for the language used by the testatrix. It is common knowledge that churches do carry on under their ægis various objects. I do not pause to enlarge on that, because in this case we have evidence of the fact. An affidavit, which I venture to think is of considerable importance in this case, has been filed. It is made by Mr. Ross, the present Vicar of St. Alban's. He tells us in that affidavit that there are various objects in connection with St. Alban's Church, and he enumerates them. There are the St. Alban's District Mission House, the St. Alban's Nursery, the St. Alban's Schools Emergency Fund, the St. Alban's Men's Club, and various other objects which he specifies in his affidavit as being objects connected with St. Alban's Church. That class of objects appears to me to fall naturally and literally within the words used by the testatrix in her will, and when I look at the nature of these objects I find certainly that one or more are not charitable objects. I take the men's club, and I find in the exhibit filed that a third of the income of that object is derived from payments made for playing billiards, and that about one-fifth of the expenditure of that object is expenditure incurred in connection with whist drives. It seems to me impossible to say that such a club is a charitable object. But it is sufficient to say that at any time there may arise an object which is not charitable, but which is an object in connection with St. Alban's Church within the meaning of the words used by the testatrix, so that it would be within the power of the donee outside the perpetuity period—for that after all is what we are considering here—to apply the whole or part of the funds in favour of a non-charitable object. I find no justification for giving the words used by the testatrix any meaning other than their natural meaning, and I find myself in complete agreement with the concluding portion of Eve J.'s judgment when he said: "There is nothing I think in this language which indicates that the objects for which this residue can be held are necessarily charitable, they are only objects which are connected with the Church. I think there may be many objects which are not of a charitable nature; at any rate, I am not prepared to say that the objects are so limited by the expressions

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(1) [1907] 1 Ch. 382.
(2) [1909] 1 Ch. 567.
(3) [1893] 2 Ch. 41.
(4) [1927] 2 Ch. 283.
(5) [1912] A. C. 407.

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used in this will as to exclude objects which are not of a charitable nature."

Appeal allowed.

Solicitors: *Wing & Eade; Treasury Solicitor; Wing & Eade; King, Adams, Heath, Hamilton & Macmin.*

H. C. G.

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Oct. 28, 29, 30; *Nov.* 8.

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[1928. E. 832.]

Civil Service—Royal Irish Constabulary—Disbandment—Compensation payable by Treasury to retiring Officers and Men—Annual Allowance—Based on Salary and Pay—" Calculated in like manner to the pension which the officer or constable would have been entitled to "—Exclusion of special Allowances in computing Compensation—Children of deceased Constable—Limitation on their right to Gratuities—Constabulary (Ireland) Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 55), *s.* 1, *Schedule, Part I., Rules.*

The Royal Irish Constabulary, which was established by statute in 1836 and had since been regulated by various Acts and Orders, was, in consequence of the Treaty creating the Irish Free State, disbanded on August 31, 1922, by the Constabulary (Ireland) Act, 1922, under which every retiring officer and constable became entitled to receive such compensation as might be awarded to him by the Treasury in accordance with the Rules contained in Part I. of the Schedule to the Act. Under those Rules the compensation was to be an annual allowance to be calculated in like manner as the pension which the officer or constable would have been entitled to, if he had retired from length of service and had qualified for a pension under the existing enactments, but with the addition of ten or twelve years' hypothetical service according as the proportion of his salary on which his allowance is calculated is one-fiftieth or one-sixtieth. The latest existing enactments in force relating to pay, allowances and pensions were two Orders made in May, 1920, in regard to pay and allowances and an Order made on March 16, 1922, relating to pensions, all of which were made under powers conferred by the Constabulary and Police (Ireland) Act, 1919, s. 4.

In an action brought by former officers and constables of the force who had been disbanded, and the wife and infant children of a former constable who had also been disbanded and died in 1925:—

Held, (1.) that in computing the compensation payable under the Constabulary (Ireland) Act, 1922, allowances being made to members of the force at the time of disbandment ought not to be taken into account and treated as part of the " salary " having regard to the wording of r. 2 of Part I. of the Schedule to the Act of 1922 and to cl. 16 of the Royal Irish Constabulary Allowances Order, 1920, which provided that no allowances were to be taken into account for the purpose of computing the pension of a member of the force or the pension, gratuity or allowance of the dependants of any member of the force. "Salary" in r. 2, clauses (*a*) and (*b*), ought not to be given the wider meaning expressly conferred on it by the earlier statutes relating to the force, which could not be treated as in pari materia.

(2.) That as under r. 4 of the same Part the allowances to children of a deceased member were to be granted "in like manner as if the allowance were a pension," the conditions imposed by cl. 6 (*a*) of the Pensions Order, 1922, applied, and the infant plaintiffs were entitled to no allowance, as they did not die within twelve months of their father being awarded compensation.

Decision of Eve J. [1929] 2 Ch. 244 affirmed.

APPEAL from a decision of Eve J. [1929] 2 Ch. 244.

The facts, which with the relevant portions of the statutes and Orders relating to the Royal Irish Constabulary, including the Constabulary (Ireland) Act, 1874 (37 & 38 Vict. c. 80), the Constabulary (Ireland) Amendment Act, 1882 (45 & 46 Vict. c. 63), and the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), were fully stated in the judgment of Eve J., are briefly as follows.

In August, 1922, the Royal Irish Constabulary were disbanded pursuant to the Constabulary (Ireland) Act, 1922 (12 & 13 Geo. 5, c. 55), and s. 1 of that Act provides that every retiring officer and constable shall be entitled to receive such compensation as may be awarded to him by the Treasury in accordance with the rules contained in Part I. of the Schedule to the Act.

Rule 1 enacts that the compensation to an officer or constable shall be an annual allowance, and r. 2 that the annual allowance is to be calculated "in like manner as the pension which the officer or constable would have been entitled to receive if he had retired for length of service under the existing enactments applicable to him and had been qualified in respect of his length of service for a pension, save that for the purposes of that calculation" certain provisions set out in clauses (*a*) to (*d*) should have effect. The main effect of these provisions was (clause (*a*)) that there were to be added to his completed years of actual service ten or twelve years, according as the proportion of his salary on which his allowance was calculated was one-fiftieth or one-sixtieth, and (clause (*b*)), that his salary should be taken as the amount which it would have reached, if he had continued to serve in the same rank for the number of years so added, and in the case of district inspectors of the second and third classes respectively as if they had received the several promotions there mentioned. Rule 4 provides that "in the event of an officer or constable dying after an annual allowance has been awarded to him under this Act, the Treasury shall grant a pension or gratuities to the widow or children of the officer or constable in like manner as if the allowance were a pension granted to the officer or constable on retirement, and as if his years of service had been the years on which the allowance was calculated." Rule 5 provides that "In these rules the expression 'existing enactments' means enactments in force at the time of the passing of the Act and includes any Orders made under those enactments and in force at that time."

Various allowances were being made to officers and men at the date of disbandment in addition to their pay. These allowances were set out in the Schedule to the Royal Irish Constabulary Allowances Order dated May 13, 1920, which was one of three Orders made at that time in regard to pay, pensions and allowances respectively under the powers conferred by the Constabulary and Police (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 5), s. 4. Para. 16 of the Schedule to the Allowances Order provides that "none of the allowances specified in this Schedule shall be taken into account for the purpose of computing the pension or gratuity of any member of the force or the pension, gratuity or allowance of the wife, child or dependant of any member of the force."

Pensions were at the date of disbandment payable in accordance with the scales and provisions contained in the First Schedule to the Pensions Order dated March 16, 1922, which was also made in exercise of the powers conferred by s. 4 of the Act of 1919. Clause 6 (*a*) of the Order provides that "where a member of the force, having been granted a pension, dies within twelve months after the grant of the pension, or at any time from the effects of an injury received in the execution of his duty without his own default, his children under 16 years of age shall be entitled to allowances until they severally reach the age of 16 years."

The first three plaintiffs, Egan, Justice and McCarthy, were a county inspector, a sergeant and a constable in the Royal Irish Constabulary. They and one Percy Shea, another constable and the husband of the plaintiff Helena Shea, were awarded annual allowances by way of compensation by the Treasury on the disbandment of the Constabulary. Percy Shea died in 1925, and thereafter a pension of 30*l.* a year was awarded to the plaintiff Helena Shea. The remaining plaintiffs were Percy Shea's infant children, to whom no allowance or gratuity had been awarded.

The plaintiffs claimed that, in calculating the compensation to be paid to them, the Treasury ought to have included in the salary or pay which formed the basis for computing the compensation, the allowances which at the date of disbandment were being made to the officers and men. It was also claimed that the infant children of Percy Shea were entitled to gratuities.

Eve J. said that, after the three Orders of May, 1920, relating respectively to pay, pensions and allowances, and in particular the Allowances Order with its express provision that none of the allowances were to be taken into account for the purpose of computing the pension, it was impossible to hold that a statutory rule which began by directing that the compensation allowance was to be calculated in like manner as the pension would bend to a construction which in effect would result in the calculation being made in a manner not merely different from but actually contrary to that laid down for calculating the pension. The word "salary" in the Act of 1922 was equivalent to pay or annual pay. The claim of the four adult plaintiffs therefore failed.

As regards the claim of the infant plaintiffs he (his Lordship) thought that r. 4 in Part I. of the Schedule to the Act of 1922 involved a reference to cl. 6 of the Pensions Order of March 16, 1922, and limited the right of children

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of a deceased constable as there provided. As Shea did not die from the effects of an injury received in the exercise of his duty, or within twelve months after the allowance had been awarded to him, the infant plaintiffs could not successfully claim allowances. The action must therefore be dismissed.

The plaintiffs appealed.

A. A. Dickie (*K.C. Ireland*) and *Hector Hughes* (*K.C. Ireland*) for the appellants.

Sir W. Jowitt A.-G., *Sir J. B. Melville S.-G.*, *Giveen* and *Stafford Crossman* for the respondent.

The arguments were substantially the same as before Eve J., except that counsel for the respondent were only called on to argue in regard to the claims of the infant plaintiffs.

Cur. adv. vult.

Nov. 8. LORD HANWORTH M.R. The judgment of Eve J., from which this appeal is brought, appears to me to recount fully the history of, and the legislation applicable to, the questions raised in the case, and I find his conclusion in law complete and convincing. For my own part, therefore, I would have been prepared to say on the appeal that I agree, respectfully, with him; but in deference to the forcible argument of Mr. Dickie, I will add a little more to develop one or two points, and to emphasize the reasoning of the learned judge.

The rights of the first two classes of persons whose interests are affected by the judgment, that is to say the officers and men of the Royal Irish Constabulary, and their widows, depend upon the determination of the same point—whether allowances are to be taken into account, as well as salary or pay, in estimating the pension or compensation to be awarded. The rights of the infant plaintiffs depend upon the true interpretation of a clause which I will deal with separately and later.

On the first point, it is contended that it is provided in the statutes of 1874 [Constabulary (Ireland) Act, 1874] and 1882 [Constabulary (Ireland) Amendment Act, 1882] by a clause in s. 3 of the first Act of 1874, and by a clause in s. 3 of the later Act of 1882, that salary "shall include all allowances for lodging, house rent, and servant," and that thus a meaning had become attached to the word "salary," to which effect must be given whenever it appears in later statutes or Orders.

But in each Act the purpose of such an interpretation is clearly stated. Thus in the Act of 1874, "in calculating any superannuation which shall be granted according to the scale and on the conditions prescribed by this Act to members of the Constabulary Force"; and in the 1882 Act—"for the purpose of calculating the amount of any pension which may be granted under this Act."

The amplification of the word "salary" is thus in each case plainly restricted to what is to be done under the powers of the Acts respectively, and their terms cannot be used for purposes outside those Acts. More than that, the well known rule "expressio unius" compels the construction in other places that where such words are not found in a statute or Order their omission is significant.

Next, attention is called to the interpretation section—74—in the Government of Ireland Act, 1920. True it is that section says: "The expression 'salary' includes remuneration, allowances, and emoluments"; but only, as the general words of the section state, "unless the context otherwise requires."

By s. 73, sub-s. 2: "nothing in this Act shall affect the administration of any service before the day appointed for the transfer of that service from the Government of the United Kingdom." Now, the Royal Irish Constabulary were not transferred. They were disbanded by the Act of 1922. By s. 60, sub-s. 4, of the Government of Ireland Act, 1920, the provisions as to compensation in the Ninth Schedule of the Act apply up to the date of transfer, and in that Schedule "existing enactments" are applied, save in so far as modifications are introduced by that Schedule. One of the existing enactments was the statute of 1919—the Constabulary and Police (Ireland) Act—and by s. 4, power was given to the Lord Lieutenant to make orders as to the pay, pensions and allowances of members of the Royal Irish Constabulary and by the interpretation section that term is to include pensions and allowances of widows or children of members. Under the powers given by s. 4, an Order dated May 12, 1920, was made, prescribing the rates, scales, and conditions of pay to members of the Royal Irish Constabulary as stated in the Schedule to it. An Allowances Order was made on May 13, 1920, dealing with a number of allowances outside and beyond allowances for "lodging, house-rent, and servant"; but in clear terms in cl. 16 it was laid down that none of the allowances specified in the Schedule to it "are to be taken into account for the purpose of computing the pension or gratuity of any member of the Force or the pension, gratuity or allowance of the wife, child or dependant of any member of the Force."

Those Orders were "existing enactments" within the Act of 1920, and being so, and in view of the clause in the Allowances Order, it is, in my judgment, clear that the context of the Act did require the negation of the interpretation contained in s. 74.

By a third Order, dated March 16, 1922, the scale of pensions and gratuities to be granted on retirement to members of the Royal Irish Constabulary of all ranks, and the scale of pensions, gratuities and allowances to the widows and children of members, was prescribed.

The enactment that really governs the question is the Act of 1922. By s. 1 of that Act, coupled with Sch. I., and the Rules in it, compensation is to be given to the officers and constables of the Royal Irish Constabulary in the form of an annual allowance and to be calculated in like manner as the pension which the officer or constable would have been entitled to receive, if he had retired from length of service under the existing enactments applicable to him and had been qualified in respect of his length of service for a pension. Some modifications are introduced by the Schedule which alter the length of service on which the calculation is to be made, but the existing enactments are adhered to for the basis on which the pension is to be ascertained in respect of such years of service. In view of the terms of the existing enactments, I cannot find any justification for the claim to add allowances to salary or pay for the purpose of the calculation of the annual allowance under the Schedule of the Act of 1922.

The other argument, to which I will refer, is that all these Acts and Orders are in "pari materia," so that the word "salary," or "pay" which is found in them is to be interpreted with the meaning attached to salary in the earlier Acts; and pay it is claimed is a word of even wider import. The words of Lord Mansfield in *Rex* v. *Loxdale* (1) are relied upon that "where there are different Statutes in pari materia, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other." I find it difficult to hold that the several statutes or Orders, to which we have been referred, satisfy the test of all being in pari materia. They were passed at different times to meet changing circumstances, and do not deal successively with pensions and allowances to the Royal Irish Constabulary only, though those matters are incidental to the changes which the statutes introduce. Reference to cases which illustrate the application of Lord Mansfield's doctrine is sufficient to show that it does not apply here where there are interpretation sections and express terms to be considered. The Court is not placed in the difficulty that confronted it in the case of *Ex parte Copeland* (2), or in the *Goldsmiths' Co.* v. *Wyatt* (3); nor does the rule exclude the maxim that I have already referred to, which arises upon the contrast in the terms used—the expression of the meaning to be attached to salary in some places and its omission in others: see per Cockburn C.J. in *Smith* v. *Brown* (4), a case which is specifically referred to by Farwell L.J. in the *Goldsmiths' Co.* v. *Wyatt* (3), as illustrating the application of Lord Mansfield's principle.

(1) (1758) 1 Burr. 445, 447.
(2) (1852) 2 D. M. & G. 914.
(3) [1907] 1 K. B. 95.
(4) (1871) L. R. 6 Q. B. 729, 733.

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These comments lead me, upon the same reasoning which is applied by Eve J., to the same conclusion. I have added them only as confirmatory of his judgment.

The rights of the infant plaintiffs depend upon the proper construction of r. 4 of the Schedule to the Act of 1922. It is in these terms: "In the event of an officer or constable dying after an annual allowance has been awarded to him under this Act, the Treasury shall grant a pension or gratuities to his widow or children in like manner as if the allowance were a pension granted on retirement and as if his years of service had been years on which the allowance was calculated." The words "in like manner"—as if the allowance were a pension granted on retirement—indicate that reference must be made to what would have been the rights of the officer or constable to a pension. Awkward as the words may be, the comparison is to what would have been the case where a pension is granted on retirement—that is retirement of an officer or constable, and the reference is to cl. 6 of the Pensions Order of March 16, 1922, with the limitations introduced by cl. 9 of Part II. of the Schedule to that Order. That Order contains the whole code. The imit of sixteen years of age for the duration of the gratuity is accepted by Mr. Dickie and it is not possible to pick and choose what portion of the conditions laid down shall be applicable. In my judgment Eve J. has effectively answered the argument addressed to us on this point.

For these reasons the appeal must be dismissed.

LAWRENCE L.J. I agree with the judgment of Eve J., which really covers all the points taken on this appeal. In deference, however, to the exhaustive argument addressed to us by Mr. Dickie I will add a few remarks of my own.

The first and main question is whether the amount of the annual allowance which may be awarded as compensation to a member of the Royal Irish Constabulary under the Constabulary (Ireland) Act, 1922 (and incidentally therefore the amount of a widow's pension), ought to be computed on the basis of the pay which the member was receiving at the date of the disbandment of the force or on the basis both of the pay and of the allowances which he was then receiving. The answer to this question depends upon the true construction of r. 2 in Part I. of the Schedule to the Act. Mr. Dickie strenuously contended that the expression " shall be calculated in the like manner as the pension " in that rule did not mean that the compensation allowance was to be calculated on the same basis in all respects as a pension but only that it was to be calculated according to the same scale (that is to say the same number of years of service) as a pension. If the latter had been the true intention of the Legislature it would seem strange (especially in view of the later provisions of the rule) that no express provision should have been inserted in the rule that the compensation allowance should be based on pay and allowances and not, as in the case of pensions, on pay only. Mr. Dickie, however, relied upon certain indications which he maintained were to be found in the rule as showing that such was the real intention of the Legislature. The main indications so relied upon were, first, the use of the word " calculated " ; secondly, the fact that the annual allowance was by way of compensation ; and thirdly, the use of the word " salary " in sub-paras. (*a*) and (*b*). The word " calculate " is perhaps not very happily chosen. In ordinary parlance it is, no doubt, frequently used as meaning to " count " or " reckon," but reading the rule as a whole I think that the right conclusion is that the word " calculated " is there used in its wider sense of " estimated " or " ascertained " and that the true meaning of the rule is that any officer or constable serving in the force at the date of disbandment is to be placed in the same position as that which he would have occupied if he had retired and had qualified for a pension on the footing of the assumptions which are to be made under sub-paras. (*a*) to (*d*) of the rule. In the absence therefore of any provision to the contrary it seems to me plain that the proper step to be taken under the rule in order to calculate the compensation allowance is to ascertain what pension the officer or constable would have been entitled to receive under the existing enactments if he had retired and had been qualified for a pension in respect of his actual and assumed length of service.

The expression "existing enactments" is defined by r. 5 as meaning enactments in force at the time of the passing of the Act and as including any orders made under those enactments and in force at that time. The relevant "existing enactments" are, first, s. 4 of the Constabulary and Police (Ireland) Act, 1919, whereby the Lord Lieutenant with the concurrence of the Treasury is empowered to make Orders as to pay, pensions and allowances of the members of the Royal Irish Constabulary; secondly, the Pay Order, 1920, made under that section, prescribing the rates, scales and conditions of pay; thirdly, the Allowances Order, 1920, also made under that section, prescribing the rates, scales and conditions of allowances and providing (by para. 16 of the Schedule) that none of such allowances shall be taken into account for the purpose of computing pensions; and fourthly, the Pensions Order, 1922, also made under that section, prescribing the rates, scales and conditions of pensions on retirement which are based wholly upon the rates of pay of the retiring members. It is clear, therefore, that when the Act of 1922 was passed a member of the force on retirement would be entitled to receive a pension based on pay only. In my opinion the language used in r. 2 in Part I. of the Schedule to the Act of 1922 expresses sufficiently plainly that the compensation allowance is to be calculated not only on the same scale but also on the same basis as a pension, and that this was what was intended by the expression "calculated in like manner as the pension." The allowance is no doubt to be awarded as compensation for loss of membership of the force, but the quantity and quality of such compensation are to be ascertained in accordance with the provisions contained in the rule. Therefore the fact that the annual allowance is an allowance by way of compensation does not advance the argument of the appellants or help to elucidate the question raised on this appeal.

As regards the word "salary" in sub-paras. (*a*) and (*b*) of the rule Mr. Dickie contended that it ought to bear the same meaning as it bears in the Government of Ireland Acts, 1914 and 1920, as being Acts in pari materia. In each of those Acts, however, there is an express provision that unless the context should otherwise require, the expression "salary" in that Act should include remuneration, allowances and emoluments. No such provision is to be found in the Act of 1922. Moreover, the Act of 1922 is not in my opinion in pari materia with the Acts of 1914 and 1920 within the meaning of the principle invoked by Mr. Dickie. Further, if I am right as to the true interpretation of the earlier part of the rule the context requires that the word "salary" in sub-paras. (*a*) and (*b*) should be read in its narrower meaning of "pay" in which sense it is sometimes used in the earlier Acts referred to by Mr. Dickie and commented on by the learned judge. In my opinion it would be ascribing far too much weight to the use of the word "salary" to hold that it operated to exclude from the calculation to be made under the earlier part of the rule the ascertainment of the amount of the pension to which the member would have been entitled and to reduce that calculation to a mere application of the scale upon which the compensation allowance was to be assessed.

In the absence, therefore, of any reliable indication to the contrary I am of opinion that the proper inference to be drawn from the language of the rule is that the compensation allowance is to be calculated on the same basis as a pension—namely, on pay only and not on pay and allowances.

The only other question which arises is whether the children of a member of the force who has died more than twelve months after a compensation allowance had been awarded to him are entitled to gratuities under the Act of 1922. Mr. Dickie admitted that under r. 4 in Part I. of the Schedule to the Act of 1922 the children of a member of the force to whom a compensation allowance had been awarded under r. 2 are only entitled to the same class of allowances or gratuities as the children of a member to whom a pension had been awarded, but he contended that r. 4 did not on its true construction import the condition that in order to entitle the former children to take the father must have died within twelve months of the award of the compensation allowance, as provided in the case of a pension in cl. 6 (*a*) of the Pensions Order, 1922. In my opinion this contention is not well founded. The true effect of r. 4 is, I think, to place the children of a member to whom compensation allowance has been awarded in every respect in the same position *qua* gratuities as the children of a member who has retired for length of service and to whom a pension in respect of length of service has been granted and not to give them any higher right to gratuities. If this be the true view it follows that all the provisions of the Pensions Order, 1922, defining the conditions under which children of a pensioner are entitled to receive gratuities, including the condition that they are only qualified for the receipt of a gratuity, if their father should die within twelve months after the grant of the pension and if they are under sixteen years of age at the date of his death, apply to the children of a member to whom a compensation allowance has been awarded "in the like manner as if the allowance were a pension." There seems to me to be no valid reason why one of these conditions should be excluded any more than the other.

In the result I agree that the appeal fails and should be dismissed.

RUSSELL L.J. This appeal is concerned with questions which affect closely the interests of the officers and men of the old Royal Irish Constabulary and involve large sums of money. But for this fact, I would have been content merely to agree with and adopt the carefully reasoned judgment of Eve J. In view, however, of this fact, I think it right to add a few observations of my own.

The questions for solution are two. The first may thus be stated: Whether, in awarding compensation to officers and constables under the Constabulary (Ireland) Act, 1922 (which I will call the Act of 1922), the Treasury must include or not in the salary, on which the annual allowance is calculated, allowances as specified in the Schedule to the Royal Irish Constabulary Allowances Order, 1920.

The question is, in my opinion, one which entirely depends upon the true construction of the Rules contained in Part I. of the Schedule to the Act of 1922. We heard a very full argument based upon a minute analysis of earlier statutes, by which it was sought to be established that the word "salary" in the Act of 1922 must perforce be construed as including the allowances in question. According to the argument, the earlier legislation (in particular s. 3 of the Constabulary (Ireland) Act, 1874, and s. 3 of The Constabulary (Ireland) Amendment Act, 1882), had attributed a meaning to the word "salary," when used in connection with superannuation, which involved the inclusion of allowances; that a definite meaning, involving the inclusion of allowances, was specifically given to the word "salary" as used in the Government of Ireland Act, 1914, and the Government of Ireland Act, 1920; and that, the Act of 1922, being in pari materia with these two Acts, the same meaning must be given to the word "salary" as used in the Act of 1922.

I feel unable to accede to this argument. The language of the Act of 1922 is, in my opinion, free from ambiguity, and falls to be construed without reference to the earlier Acts, even if those earlier Acts be treated (as in my view they ought not to be treated) as being in pari materia.

Let me now consider the relevant provisions of the Act of 1922. Sect. 1 gives the man a right to compensation, to be awarded to him by the Treasury in accordance with the Rules. This presupposes that the Rules are such that the Treasury will find therein the means of ascertaining the exact amount of compensation to which the man is entitled. There can be no exercise of discretion in a matter of statutory right. An examination of the Rules seems to bear this out.

Rule 1 makes the compensation take the form of an annual allowance. Rule 2 is the all important rule. Without analysing or parsing it, I will state in the form of paraphrase what the wording of r. 2 conveys to me as being its clear meaning. It is this: You are to ascertain the amount of the annual allowance of a man, in the same manner as the manner in which you would ascertain the amount of the pension which he would have been entitled to receive, if he had retired for length of service under the existing enactments applicable to him, and had been qualified in respect of his length of service for a pension, but with certain variations. To these variations, I will recur later.

By virtue of r. 5, the existing enactments applicable will include the Royal Irish Constabulary Allowances Order, 1920, and the Royal Irish Constabulary Pensions Order, 1922; by the former of these, it is in terms provided that none of the allowances shall be taken into account for the purpose of computing the pension of any member of the force. There can be no doubt, therefore, that in ascertaining the amount of such a pension, as is referred to in r. 2, all allowances would be disregarded.

The appellants, however, contend that in ascertaining the amount of the annual allowance, they must be included. I confess to feeling great difficulty in appreciating the foundation of this argument. As I understood it, it is wholly based on the words "shall be calculated" being confined, in their application, to such portion of the Treasury's operations as consists of multiplying a fraction of the "salary" by a number of years' service, and as not having any reference to the ascertainment of the total salary, of which the fraction in question is a fractional part.

I can see no justification for limiting the application of the words "shall be calculated" in the manner suggested. You calculate an annual sum by ascertaining the amount thereof, after taking into account all material factors. You calculate the value of a thing by ascertaining what sum represents its value, after taking into consideration all relevant matters which affect its value. Rule 2, as I read it, tells the Treasury to ascertain the amount of the annual allowance, to which any particular man is entitled, by ascertaining what pension he would have been entitled to if his pension had been ascertained under existing enactments, but with the variations which are specified in r. 2.

The variations are four in number: 2 (*a*) credits the man with a fictitiously increased period of service; 2 (*b*) credits the man with the increased salary which he would have been earning had he in fact served the full fictitious period; 2 (*c*) does away with minimum periods of service; 2 (*d*) credits the man with a full year in respect of a fractional period in excess of six months. These are four variations in favour of the man, which operate to make the annual allowance larger than the pension. The argument of the appellants seeks, in truth, to add a fifth variation of the method of computing the pension—namely, to include allowances in a man's salary instead of excluding them.

The language of r. 2 does not justify this contention: in my view it clearly negatives it. The opening paragraph of r. 2 brings into play a method of calculating pensions, in which allowances are in fact excluded. Moreover if salary in r. 2 is to be treated as including all allowances, I cannot see how para. (*b*) will be workable; for no one could tell or speculate as to the amount which a man's salary (including all allowances) would have reached if he had in fact served to the end of the fictitious period.

In my opinion the appeal fails upon the first point.

The second question raised for our decision was this. Is the Treasury under any obligation to grant any benefit to the children of an officer or constable who dies more than twelve months after an annual allowance had been awarded to him under the Act of 1922? The answer depends upon the true construction of r. 4.

Rule 4 is not a model of accurate grammar. According to the wording, the Treasury is to grant X in like manner as if Y were Z. The meaning, however, is reasonably plain. Again let me have recourse to paraphrase. If a man dies, after an annual allowance has been awarded to him under the Act, leaving a widow or children, or a widow and children, you are to see what pension or gratuities would have been payable to the widow and children, if the man's annual allowance had been a pension which had been granted to him on retirement, after having in fact served the fictitious number of years on which the annual allowance had been calculated. There is then imposed by the rule an obligation on the Treasury to grant such pension or gratuities to the widow and children. The Treasury is told to make the grant to the widow and children not simply "as if the allowance were a pension" but "in like manner as if."

It is conceded by the appellants that the words in question introduce (as regards children) the condition that they should be under sixteen years of age, and (as regards widows), the provisions contained in Part III. of the First Schedule to the Royal Irish Constabulary Pensions Order, 1922. It is said, however, that (as regards children) the provision which requires death of the father within twelve months after the grant of the pension (see cl. 6 of that Order) does not apply.

I feel unable to take this view. The words "in like manner" in r. 4 have the effect, in my opinion, of attaching to the Treasury's obligation to grant, and to the subject-matter of the grant, all the incidents, conditions and restrictions which would have existed in regard thereto if the man's annual allowance had in fact been a pension as described.

Reliance was placed on the fact that in r. 5, in the Fourth Schedule to the Government of Ireland Act, 1914, the words "within one year" appeared. It was suggested that they were omitted from the Act of 1922 for the very purpose of excluding the one year provision. On the other hand, it may well be that the Legislature omitted the words as surplusage. Without indulging in speculation, I find that the words of r. 4, as they stand, indicate clearly an intention that the Treasury should be under an obligation to make a grant to a widow and children under r. 4, only in cases where they would have been under such obligation if the man's allowance had been a pension as described in r. 4.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost; The Treasury Solicitor.*

H. C. G.

In re GWYON.

PUBLIC TRUSTEE *v.* ATTORNEY-GENERAL.

EVE J.

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Nov. 14, 15, 29.

Will—Construction—Charity—Trust of Residue to create "Foundation for clothing boys"—Limitation of Trust to prescribed Localities—No Restriction of Benefit to Children of poor Parents—Exclusion of Paupers—Trust void for Remoteness.

A testator devised and bequeathed the whole of his residuary estate to his executor upon trust for conversion, and directed that the net residue should be transferred into the names of the Official Trustees of Charitable Funds upon trust to establish a foundation to be known as "Gwyon's Boys Clothing Foundation." The will directed that the net income of the property should be applied in providing knickers, as specified, for the boys of Farnham and district, and, if the income was sufficient, other places in Surrey mentioned in the will. All boys resident in the area who were between ten and fifteen years of age were eligible, with certain exceptions, for an annual gift of a pair of knickers from the fund, and no preference was indicated by the testator for the children of poor parents; on the contrary boys maintained in or by charitable institutions, or whose parents were in receipt of poor relief were expressly excluded from the benefit of the trust. The scheme was further elaborated in five codicils to the will, by one of which the testator declared that his foundation was not to be merged or amalgamated with any other institution or charity and its income was not to be applied to any other objects than those precisely specified:—

Held, that the scheme of the will did not tend to the relief of poverty, and therefore it did not create a valid charitable trust but was void for remoteness. A trust which is not a charitable trust cannot be converted into a charity by limiting the area in which it is to operate, though such limitation may prevent a charitable trust from being avoided for vagueness and uncertainty.

Dictum of Lord Shaw in *Houston* v. *Burns* [1918] A. C. 337, at p. 349, followed and applied.

ORIGINATING SUMMONS.

The following statement of facts is taken from the judgment of the learned judge:—

The testator, the Rev. John Gwyon, made his will on May 25, 1912, and thereafter five codicils dated respectively July 23, 1914; March 4 and July 3, 1916; January 19, 1920; and March 5, 1925. He appointed the Public Trustee his sole executor and died on December 27, 1928. His will and codicils were duly proved on March 6, 1929. His testamentary dispositions were entirely devoted to the establishment and administration of a foundation to be known as "Gwyon's Foundation for Clothing Boys," or "Gwyon's Boys Clothing Foundation," and to that end he devised and bequeathed all his real and personal estate to his executor upon trust for sale and conversion, and directed that after payment out of the proceeds of his funeral and testamentary expenses and debts, the residue should with the assent of the Charity Commissioners be transferred into the names of the Official Trustees of Charitable Funds in trust for the Foundation, and to the intent that the fund and the investments thereof should be managed and administered in conformity with the provisions therein contained. By clauses 12 and 13 of the will he directed that subject to the payment out of the income of all the proper charges and expenses of management and administration, all the yearly income of the Foundation should be applied for the purpose of providing boys who were eligible under the provisions thereinafter contained with knickers, in the manner thereinafter provided and for no other purpose whatsoever, whether educational or otherwise, and he expressly directed that no trousers or other garment than knickers should be provided. And after providing for the appointment of a tailor (thereinafter referred to as "the tailor") to make the garments in manner thereinafter described or to provide ready-made garments, the testator by clause 15 declared that all boys the sons of parents resident in the Farnham district who should be of the age of thirteen years—which should be deemed to be the standard age for the purposes thereof—or whose ages came nearest to thirteen years (whether before or after attaining that age), should be eligible for the benefits of the Foundation. Provided always that no boy should be eligible (1.) who should belong to or be supported by any charitable institution, (2.) who or whose parents should be in receipt of parochial relief, (3.) who should be under the age of ten years or over the age of fifteen years, or (4.) who should be a black boy; and by clause 17 that whenever a boy should make a second application no reference or inquiry should be made as to his having had a garment from the Foundation in the previous year, if the age of the boy should not disqualify, but no boy who or whose parents should in the meantime have (1.) received parochial relief or (2.) disposed of any garment received within the then preceding year from the Foundation should be again eligible, and by clauses 21 and 22, that no part of the income of the Foundation should be applied either directly or indirectly in aid of any rates for the relief of the poor or for any other purposes than those therein specified and that if the Foundation should at any time possess funds the income of which should be more than should be required to provide a pair of knickers for each successful applicant in the Farnham district once a year, the balance should be applied to provide in the same manner for boys similarly qualified who should be resident in the following places in the county of Surrey, and in the following order: (1.) the urban district of Windlesham, (2.) the civil parish of Chobham, (3.) the urban district of Egham, (4.) the urban district of Woking, and (5.) any other district or districts in the said county which should be nominated for that purpose by the Surrey County Council.

By his first codicil, testator by clause 3 declared that by the term "knickers" he meant ordinary strong and durable knickers such as were worn by boys every day, but no sporting or fancy knickers of any kind such as football knickers, cricket knickers, military knickers, boy scout knickers, etc., and in clause 5 expressed his hope that no legal or technical point or points would ever be raised with a view to defeating his intention to provide knickers only for boys as defined in his will and codicils. By his second codicil he directed that in case of extreme national or local distress, cause, emergency, or other reason whatsoever the Foundation should never be diverted by the Trustees on the application of any person or public body to the relief or on account of such distress, emergency, cause or reason, but should always be applied as specified for boys only under all circumstances, and that, as in some parliamentary enactments the term "male" includes "females" as a general principle, unless the instrument or enactment creating a particular object specifically provided to the contrary, it should always be understood

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that the term "boys" in the instrument creating the said Foundation meant exclusively boys and did not include girls or other females, and that he desired that the benefits of the said Foundation should go to the town of Reigate immediately after the requirements of Farnham were satisfied, and that the places mentioned in clause 22 of his will should follow afterwards in the order therein specified.

By clauses 5 and 6 of the third codicil the testator declared that if, after his death, the net capital of the Foundation should be less than 10,000*l.* none of the income should be expended on the objects of the Foundation until the net capital should be 10,000*l.*, the income to be added to capital until the net capital should reach 10,000*l.*, and if at any future time owing to market depreciation or for any other cause the net capital should be reduced below that figure, the expenditure of the income on the objects of the Foundation should be suspended and the income be added to capital until the capital reached the minimum required net limit of 10,000*l.*, and that the said Foundation should never be merged, consolidated or amalgamated with any Trust or Foundation whatsoever under such names as "Amalgamated Foundation," "Amalgamated Trust," "Merged Funds," etc., of such and such a district, but should always remain distinct separate and exclusive under the title of "Gwyon's Boys Clothing Foundation" and no other title whatsoever. By clause 2 of the fourth codicil testator substituted the age of eighteen years for the age of fifteen years mentioned in clause 15 of his will and by clause 6 declared that each successful boy of not less than fifteen years and not more than eighteen years of age might, if he desired, choose a pair of trousers instead of knickers, and by clause 3 of his fifth and final codicil he directed that the benefits of the Foundation created under his will and codicils should not only extend to the district under the jurisdiction of the Farnham District Council, but should also extend to the points three miles or so outside the boundary of the said urban district and that that provision should also apply to each of the other areas mentioned in his will and codicils if at any time or times the benefits of the said Foundation should extend to such other areas or any of them.

The summons was taken out by the Public Trustee to have it determined whether the dispositions of the testator created a valid charity. The defendants were the Farnham District Council, as management trustees, the Attorney-General, who contended that a general charitable intention was shown, and the Treasury Solicitor, who claimed that the property went to the Crown as bona vacantia under s. 46, sub-s. 1 (vi.), of the Administration of Estates Act, 1925.

Wilfrid Hunt for the plaintiff.

Vaisey K.C. and *E. W. Lavington* for the Farnham Urban District Council. The provisions of the testator's will and codicils, though fantastic, are nevertheless beneficial to the community in Farnham and the other places mentioned in the will. It is possible to spell out of the will a provision for supplying knickers to necessitous boys, and therefore it creates a valid charitable trust: *Goodman* v. *Mayor of Saltash* (1); *In re Mellody* (2); *In re Drummond* (3); *In re Christchurch Inclosure Act.* (4) A trust for the benefit of a particular class of the inhabitants of a place or for public purposes in that place is a charity: *In re Allen.* (5)

Stafford Crossman for the Attorney-General supported the contention that the will and codicils created a charity.

J. H. Stamp for the Treasury Solicitor. The trust is altogether void, and the fund goes to the Crown as bona vacantia. The will and codicils do not create a charity, and are therefore void for perpetuity. The trusts are not for the benefit of the poor of Farnham, or any section of the poor, on the contrary boys whose parents are in receipt of parochial relief or who belong to or are supported by charitable institutions are expressly excluded. The testator has also expressly prohibited the amalgamation or merger of the fund with any charitable foundation. The will attempts to create a personal gift to a number of boys to be selected in

(1) (1882) 7 App. Cas. 633.
(2) [1918] 1 Ch. 228.
(3) [1914] 2 Ch. 90.
(4) (1888) 38 Ch. D. 520.
(5) [1905] 2 Ch. 400.

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a purely arbitrary manner: *Houston* v. *Burns* (1); *In re Macduff* (2); *In re Allen* (3); *Verge* v. *Somerville* (4); *A.-G.* v. *National Provincial and Union Bank of England.* (5)

Vaisey replied.

Cur. adv. vult.

Nov. 29. EVE J. The object of this summons is to ascertain whether certain dispositions made by the testator John Gwyon of his net residuary real and personal estate constitute good and valid charitable trusts or are wholly or in part void and inoperative. [His Lordship then stated the terms of the will and codicils and proceeded:] The will and codicils contain a number of provisions for the management and administration of the Foundation to which it is not necessary to direct attention for the purposes of this judgment. The question is whether the testator has effectively created such a charity as he contemplated, a charity in the legal sense of the word. Is the object of his benefaction the relief of poverty, are the gifts for the benefit of the poor and needy? I do not think they are. Apart from residential and age qualifications, the only conditions imposed on a recipient are (1.) that he shall not belong to or be supported by any charitable institution, (2.) that neither he nor his parents shall be in receipt of parochial relief, (3.) that he shall not be black, (4.) that on a second or subsequent application he shall not have disposed of any garment received within the then preceding year from the Foundation and that when he comes for a new pair of knickers or trousers the legend "Gwyon's Present" shall still be decipherable on the waist band of his old ones.

None of these conditions necessarily import poverty nor could the recipients be accurately described as a class of aged, impotent or poor persons. The references to the receipt of parochial relief and to the possibility of the last year's garment having been disposed of show, no doubt, that the testator contemplated that candidates might be forthcoming from a class of society where incidents of this nature might occur, but although a gift to or for the poor other than those who were in receipt of parochial relief—that is, paupers—would be a good charitable gift, it does not follow that a gift to all and sundry in a particular locality and not expressed to be for the poor ought to be construed as evidencing an intention to relieve poverty merely because the testator is minded to exclude paupers. I think that according to the true construction of these testamentary documents the benevolence of the testator was intended for all eligible boys other than paupers, and I cannot spell out of them any indication which would justify the Foundation Trustees refusing an applicant otherwise eligible on the ground that his material circumstances were of too affluent a character. In these circumstances I cannot hold this trust to be within the description of a legal charitable trust.

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(1) [1918] A. C. 337, 349.
(2) [1896] 2 Ch. 451.
(3) [1905] 2 Ch. 400.
(4) [1924] A. C. 496.
(5) [1924] A. C. 262.

It was argued that the disposition might be treated as charitable by reason of its application being restricted to the areas prescribed by the will and codicils, and extracts from the speeches in *Goodman* v. *Mayor of Saltash* (1) and the judgments in *In re Christchurch Inclosure Act* (2) and *In re Allen* (3) were read in support of that argument. Limitation or specification of locality may prevent a charitable trust from being avoided for vagueness and uncertainty, but only when it has been first shown to be a charitable trust. A trust which is not a charitable trust cannot be changed into a charitable one by limiting the area in which it is to operate. As Lord Shaw says in *Houston* v. *Burns* (4): "Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit," which is a very different thing from holding them sufficient to make charitable within a prescribed area trusts which are not charitable in the world at large. This I cannot do, and I must declare the directions and trusts of the will and codicils

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(1) 7 App. Cas. 633.

(2) 38 Ch. D. 520.

(3) [1905] 2 Ch. 400.

(4) [1918] A. C. 337, 349.

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of the testator concerning his net residuary estate to be wholly void, and that the said estate devolves as on his intestacy. The costs of all parties will be taxed as between solicitor and client, and paid and retained out of the residue.

Solicitors: *Ashurst, Morris, Crisp & Co.; Tucker, Hussey & Martin, for Kempson & Wright, Farnham; The Treasury Solicitor.*

H. L. L.

Not followed. *Re* PRATT. [1950] 2 All E.R. 540.

Considered. *In re* PRATT [1951] 1 Ch. 225

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GOWERS *v.* WALKER.

[1929. G. 1030.]

Revenue—Income Tax—Company—Appointment of Receiver—Subsequent Assessment to Income Tax—Preferential Payment of One Year's Assessment—"Assessed up to the fifth day of April"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209, *sub-s*, 1.

Under s. 107 of the Companies (Consolidation) Act, 1908, where a receiver of a company is appointed on behalf of holders of debentures secured by a floating charge, or possession is taken by or on behalf of debenture holders of property subject to such a charge, certain debts, including income tax assessed on the company up to the fifth day of April next before the date of the appointment of the receiver or of possession being taken as aforesaid, but not exceeding one year's assessment, are under the provisions of s. 209 of the Act to be forthwith paid by the receiver or person taking possession out of any assets coming to his hands in priority to any claim for principal or interest in respect of the debentures:—

Held, that the expression in s. 209 "assessed up to the fifth day of April" means "assessed for a period ending on the fifth day of April," and therefore the right to preferential payment of one year's assessment remains, notwithstanding that the assessment is not made until after the date of the appointment of the receiver or of his taking possession, as the case may be.

SPECIAL CASE stated for the opinion of the Court under Order XXXIV.

The defendant company, the Bagley and Wright Manufacturing Company (hereinafter referred to as "the company"), was incorporated on November 13, 1919, with a capital of 150,000*l.* divided into 150,000 shares of 1*l.* each, to carry on a cotton spinning business at Oldham. The capital was increased by 50,000*l.* in 1*l.* shares in 1921. By an instrument of charge dated April 8, 1924, the company created a charge in favour of the District Bank, Ld., over all its freehold and leasehold property, and a floating charge over its undertaking, goodwill, and all its other property, assets, and rights to secure any moneys then or thereafter to become owing from the company to the bank not exceeding at any time 50,000*l.* This amount was increased by a supplemental mortgage of July 28, 1926, to 54,000*l.*

On November 15, 1927, the District Bank appointed the defendant Walker receiver of the property of the company under the powers contained in the above instrument of charge, and he took possession accordingly.

On May 1, 1928, the Special Commissioners made assessments to income tax upon the company under r. 21 of the General Rules of the Income Tax Act, as amended by s. 26 of the Finance Act, 1927, in respect of tax deducted from loan interest, as follows:—

Year.	Amount.	Rate.		Tax.		
	£	s.	d.	£	s.	d.
1922–23 . . .	1112 ..	5	0 ..	278	0	0
1923–24 . . .	9810 ..	4	6 ..	2207	5	0
1924–25 . . .	7777 ..	4	6 ..	1749	16	6
1925–26 . . .	3996 ..	4	0 ..	799	4	0
1926–27 . . .	3636 ..	4	0 ..	727	4	0

The plaintiffs, who were the Commissioners of Inland Revenue, claimed one year's assessment of income tax—namely, 2207*l.* 5*s.*—for the year 1923–24 to be paid by the receiver as a preferential debt under s. 107 of the Companies Act, 1908.

The receiver had sufficient moneys in hand to meet the claim, but disputed its priority and contended that it was not justified by the provisions of ss. 107 and 209 of the Companies (Consolidation) Act, 1908. (1)

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(1) Companies (Consolidation) Act, 1908, Part IV., s. 209: "(1.) In a winding-up there shall be paid in priority to all other debts—

(*a*) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the

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This action was begun by the plaintiffs for a declaration that the above sum of 2207*l.* 5*s.* in respect of tax deducted in the year ending April 5, 1924, from interest paid by the company in that year constituted a preferential claim payable by the receiver.

The Special Case stated for the opinion of the Court submitted the question whether in the circumstances the sum of 2207*l.* 5*s.* so deducted by the company from interest paid by it in the tax year 1923–1924 constituted a debt to which priority was given by s. 107 of the Companies (Consolidation) Act, 1908, as against assets comprised in or subject to the above floating charge coming to the hands of the defendant Walker as receiver.

Sir W. Jowitt A.-G., J. H. Stamp and *R. P. Hills* for the plaintiffs. The liability for income tax for the year 1923–24 and deducted from interest on loans was a debt due to the Crown at the moment when the receiver took possession, though the exact amount was not ascertained until May 1,

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fifth day of April next before that date, and not exceeding in the whole one year's assessment.

. . . . .

"(5.) The date herein-before in this section referred to is—

(*a*) In the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(*b*) In any other case, the date of the commencement of the winding up."

Sect. 107: "(1.) Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

"(2.) The periods of time mentioned in the said provisions of Part IV. of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

"(3.) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

1928, when the assessment was made. In the same way, as regards preferential payment of workmen's compensation, the priority is given to "all amounts due in respect of compensation the liability wherefor accrued before the said date." The critical date here is April 5, 1927, the end of the financial year before the receiver was appointed and took possession. Here the liability accrued before that date. What the statute refers to is the assessment of the whole tax during the financial year. The words "which have become due and payable before the date in question" do not occur in s. 209.

"Assessed up to" does not mean "assessed before" but "assessed for the period ending on the date in question." It makes no difference whether the assessment is made before or after that date.

Jenkins K.C. and *Stair C. Agnew* for the defendants. The liability for income tax was not a debt which could be sued for when the receiver went into possession. The words as regards rates are "having become due and payable within twelve months next before that date." It is necessary to use those words with regard to rates, because the liability for rates is a current one, and there is no kind of apportionment. As regards the next group of liabilities, including income tax, these words are unnecessary: *In re Lang Propeller, Ld.* (1) The effect of this decision was reversed by s. 26 of the Finance Act, 1927, amending r. 21 of the Income Tax Rules. The whole scheme of s. 209 is to enable the liquidator or the receiver to see at the date of his appointment what debts he has to provide for. All assessed taxes, including income tax, are debts due and payable after assessment, but there is no debt due before assessment, and therefore there can be no preferential payment of the present debt. The expression "all assessed taxes" means "all taxes already assessed" but not taxes which may be assessed in future.

The natural language of the sub-section confines assessed taxes to actual present debts.

Stamp in reply. The expression "assessed taxes" is well known, and means "taxes the amount of which is ascertained and imposed by assessment." "Assessed on the company up to the fifth of April" means "assessed for the period ending fifth of April." Here the test is liability, and "debts" does not refer only to exactly ascertained debts.

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(1) [1927] 1 Ch. 120.

Cur. adv. vult.

Dec. 19. EVE J. On November 15, 1927, the defendants, the District Bank, Ld., under the powers contained in an instrument of charge dated April 8, 1924, whereby the defendant company, the Bagley and Wright Manufacturing Company (1919), Ld., charged as security for advances by the bank by way of specific security certain hereditaments and premises and by way of floating charge its undertaking, goodwill, uncalled capital, and other general assets, appointed the defendant, Vernon Walker, receiver of the defendant company's property, and he accordingly took possession thereof on the same day.

On May 1, 1928, assessments were made upon the defendant company for income tax for five years from April 6, 1922, to April 5, 1927, and the Commissioners claim that under ss. 107 and 209 of the Companies (Consolidation) Act, 1908, one year's assessment, that for the year 1923–24, ought to be paid in priority as a preferential payment.

The receiver, who has moneys in hand sufficient to make the payment, disputes the claim on the ground that no right to priority exists in a case where the tax has not been already assessed at the date when the receiver is appointed or possession is taken. He supports this attitude by reference to the language of s. 209. That section fixes the payments which, in a winding-up, are to be made in priority to all other debts, and s. 107 extends its provisions to cases where there is no winding-up, but where a receiver has been appointed or possession has been taken on behalf of creditors entitled to a floating charge.

The receiver's point is that the expression "income tax assessed on the company up to the fifth day of April" must be read as referring to tax actually assessed before the date mentioned and not as extending to tax for the period up to that date if assessed subsequently to that date.

This contention seeks to impose on the expression "up to the fifth day of April" a construction equivalent to that which it might bear if the word "before" were substituted for the words "up to." I can see no good grounds for supporting this view. The expression "up to" is a well known one in accountancy, and when books are said to be written up, balances to be struck, and accounts to be vouched up to a particular date, no implication arises that any of the operations were completed before or even on the particular date, the true meaning being that the particular date is the one up to which the state of account has been ascertained. So here income tax assessed up to a particular date is not, in my opinion, confined to the tax actually assessed before that date, but includes all assessed tax up to that date, whether the assessment was made before or after the date. Nor can I see anything in the provisions of s. 209 to lead to the conclusion that anything else was intended. The section is an exhaustive enumeration of preferential payments, qualified in each case by reasonable limitations on the quantitative amount that is to be preferred.

Thus under para. (*a*) of sub-s. 1 parochial or other local rates, assessed taxes, land tax and property or income tax are all to be treated preferentially. The same observations apply under para. (*b*) to all wages and salaries of clerks and servants, and under para. (*c*) to all wages whether payable for time or piece work to any workman or labourer, but in each case a moderate restriction is imposed on the amount for which priority can be asserted. The priority is given in the case of rates only to so much as remains unpaid, on the date fixed by sub-s. 5, of rates which become due and payable within twelve months next before that date and in the case of income tax to not more than one year's assessment of the tax assessed on the company up to the end of the financial year next before that date. In the cases of wages and salaries the limitations are twofold, in that the services must have been rendered within a fixed time before the relevant date

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and the wages or salaries must not exceed a prescribed sum. The income tax is the only item in the ascertainment of which a special date is substituted for the relevant date, and the reason for this is obviously to avoid all necessity for apportionment.

Except the statutory limitation, I can detect in the section nothing which reduces the rights of priority in respect of income tax to income tax actually assessed before the date up to which it is to be assessed, and accordingly I answer the question submitted by the Special Case in the affirmative.

Solicitors: *The Solicitor of Inland Revenue; Hickson & Parish, for Slater, Heelis, Sandbach, Marriott, Smiths & Irvine, Manchester.*

H. L. L.

Considered. *Re* WELLSTED'S WILL TRUSTS. [1948] 2 All E.R. 209.

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In re KEMPTHORNE.

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[1929. K. 184.]

Will—Devise of Freehold Property—Bequest of Residuary Personal Property—Undivided Shares of Land—Death of Testator after 1925*—Statutory Trusts—Conversion of undivided Shares into Personalty—Devolution—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 35; *Sch. I., Part. IV., para.* 1. *Administration—Bequest of Residuary Personal Property "after payment of funeral and testamentary expenses and debts and legacies"—Lapsed Shares of net Residue—Incidence of Debts—Intention—"Property undisposed of by will"—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II., paras.* 1, 3, 4.

Considered. *In re* MELDRUM, DECD. [1952] 1 Ch. 208

By his will dated December 2, 1911, a testator devised to his brother Charles "all my freehold and copyhold property," and gave all his leasehold property and personal estate and effects, subject to payment of his funeral and testamentary expenses, debts and legacies upon trust for division amongst his brothers and sisters as therein mentioned.

The testator died on August 15, 1928, and was at his death entitled (subject to the effect of the provisions of the Law of Property Act, 1925) to two equal ninth shares of certain freehold property comprised in his father's residuary estate, and to one equal fourth part of certain freehold minerals purchased by him. He also owned the entirety of

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certain other freehold property. The residuary gift of personalty lapsed as regards three equal seventh parts owing to the death of two legatees in the testator's lifetime:—

Held, (1.) that as the land held in undivided shares was by the Law of Property Act, 1925, Sch. I., Part IV., para. 1 and s. 35, subjected to a trust for sale as from January 1, 1926, the testator's interest in undivided shares of freehold property was then converted into personal property and passed on his death under the gift of personal property.

In re Price [1928] Ch. 579 approved and followed.

In re Wheeler [1928] W. N. 225 (reprinted [1929] 2 K. B. 81) and *In re Mellish* (noted in *In re Wheeler* [1928] W. N. 226) [1929] 2 K. B. 82 distinguished.

(2.) That the testator by directing that his debts should first be paid out of the residue before division amongst the residuary legatees had shown an intention that in regard to the lapsed shares of residue the order of administration prescribed by Part II. of Sch. I. to the Administration of Estates Act, 1925, should not apply, inasmuch as the net amount of the residue available for distribution could not be ascertained until after the debts had been paid. The debts were therefore not payable out of the lapsed shares in exoneration of the other shares.

In re Petty [1929] 1 Ch. 726 and *In re Atkinson* [1929] W. N. 189; since reported [1930] 1 Ch. 47 approved.

In re Lamb [1929] 1 Ch. 722 distinguished.

Decision of Maugham J. affirmed on the first point and reversed on the second point.

ADJOURNED SUMMONS.

By his will, dated December 2, 1911, Lewis John Kempthorne (hereinafter called "the testator"), after appointing his brother Charles Henry Kempthorne and James Rice Buckley executors and trustees thereof, and after making certain gifts, proceeded as follows: "I devise to my said brother, Charles Henry Kempthorne, his heirs and assigns, all my freehold and copyhold property": and the will further provided "As to all my leasehold property, and all my personal estate and effects, including my stocks and shares, and all money due to me on debentures and mortgages, of or to which I shall be possessed or entitled at the time of my death, subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto, and the duty on any legacies bequeathed free of duty, the same shall be divided into seven equal parts, and I bequeath the same as follows:—"

The bequests were, to his sisters Elizabeth Wearne Charles and Jessie Anne Godsell, and to his brother Charles Henry Kempthorne, each one-seventh, and to his sisters Catherine Anne Buckley and Lucy Maude Lewis, each two-sevenths.

Mrs. Charles, Mrs. Buckley, and Mrs. Godsell predeceased the testator, who, by a codicil dated June 17, 1918, bequeathed Mrs. Charles' seventh share between her daughter Violet Gaskell and her son Reginald Pendrill St. John Charles, whom also he thereby appointed an executor and trustee in the place of James Rice Buckley. He died, leaving no wife, parent, or issue, on August 15, 1928, being then the owner of an equal undivided fourth share in certain freehold minerals, and being also entitled to two equal one-ninth shares in his father's residuary estate, which comprised freeholds and copyholds. The copyhold property was enfranchised by the Law of Property Act, 1922, and the whole of the property held in undivided shares was subjected to a trust for sale by the Law of Property Act, 1925. The persons entitled to the equal seventh shares of his deceased sisters included his brother Charles Henry Kempthorne, his sister Lucy Maude Lewis, and the issue who should attain the age of twenty-one years or marry under that age per stirpes of his brothers and sisters who had died in his lifetime leaving issue living at his death.

This summons was taken out by Reginald Pendrill St. John Charles, for the determination (inter alia) of the questions: (i.) whether the testator's share in his father's freehold and copyhold property and his undivided fourth share in freehold minerals were given by the devise of all his freehold and copyhold property to Charles Henry Kempthorne, his heirs and assigns, or passed under the gift of all his personal estate and effects, or were undisposed of by the will; and (ii.) whether the funeral and testamentary expenses and the pecuniary legacies given by the will and codicil ought to be paid out of the lapsed shares of residue in exoneration of the other shares.

The two questions were argued separately. On the first it was contended for the defendant Charles Henry Kempthorne that the gift in the will of "all my freehold and copyhold property" carried the freeholds, copyholds and freehold minerals; and for Mrs. Gaskell and Mrs. Lewis it was argued that the result of the testator's having in his will divided his property into "freeholds and copyholds" and "leaseholds and personalty" was that only the freeholds passed to the devisees.

H. H. King for the plaintiff.

F. K. Archer K.C. and *W. F. Swords* for the defendant Charles Henry Kempthorne. The coming into effect of the Law of Property Act, 1925, did not adversely affect beneficial rights then existent. The Court, in this case, is asked to construe the words "as may be requisite" in s. 35 of the Law of Property Act, 1925 (1): see also s. 28 of that Act. There is no reported authority on the point, but see *In re Wheeler.* (2) *In re Mellish,* an unreported case, is noted in *In re Wheeler* (3), where Tomlin J. took Eve J. as having decided that there was no ademption by reason of the coming into force of the Law of Property Act, 1925: see also *In re Price.* (4) The words used in s. 35 of the Law of Property Act, 1925, and in Part IV. of Sch. I. are peculiar—namely: ". . . . for giving effect to the rights of the persons . . . . interested in the land." The provision must mean that the statutory trusts are not to affect any beneficial right. If that is its meaning, the problem presented by the present case is solved. If that is not its meaning, the Law of Property Act is operating in a manner in which an Act of Parliament cannot be conceived to operate: *Frewen* v. *Frewen.* (5) Before the coming into force of the property legislation of

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(1) Sect. 35: "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

(2) [1928] W. N. 225.

(3) [1928] W. N. 226.

(4) [1928] Ch. 579.

(5) (1875) L. R. 10 Ch. 610.

1925, the plaintiff could have obtained his undivided share by a partition action. This was a very inconvenient procedure, abolished by that legislation.

H. B. Vaisey K.C. and *R. Gwyn Rees* for the defendants Violet A. C. Gaskell and Lucy Maude Lewis. This is primarily a question of the construction of a particular will. The testator has chosen to divide his estate arbitrarily into (i.) freehold and copyhold, and (ii.) leasehold and personalty. It is well known that grave risk attends a division of that kind, for, by s. 24 of the Wills Act, 1837, the division takes effect as from the date of the testator's death, and the devisees are entitled only to what is then freehold property. A gift of "all my personal estate" would have included money arising under an ordinary trust for sale. So why should not the statutory trust for sale operate as a conversion, as was decided in *In re Price?* (1)

A. L. Ellis for the defendant James Reginald Buckley, another of the persons interested in residue.

MAUGHAM J. The question which I have to determine here is whether certain undivided shares in the real and copyhold estates of James Kempthorne and an undivided fourth share in certain freehold mines and minerals passed under a devise in his will expressed in the following terms: [His Lordship read the provision and continued:] or whether those undivided shares passed under the residuary gift as personalty. At first sight it seems simple, but the matter is by no means free from doubt, because after the date of the will, the Law of Property Act, 1925, and the other legislation of that year came into force, and it is most difficult to determine whether the undivided shares are personal estate or come within the description, "freehold and copyhold property." The will is dated December 2, 1911, and the codicil June 17, 1918. The testator died on August 15, 1928, and probate was granted on January 4, 1929.

On behalf of the devisee of the freehold and copyhold property it is urged that the Acts of 1925 do not affect the devolution under the will of the undivided share in question. It is not disputed that by Part IV. of Sch. I. of the Law of Property Act, 1925, the land in question being of the nature of an undivided share vested in trustees upon what the Act describes as the statutory trusts. There is no doubt that the statutory trusts are to be found under s. 35 of the same Act, and accordingly these undivided shares were held "upon such trusts, and subject to such powers and provisions, as may be requisite to give effect to the rights of the persons . . . . interested in the land."

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(1) [1928] Ch. 579, 590.

Prima facie, therefore, at the date of the death of the testator and as a result of s. 24 of the Wills Act, the undivided shares were of the nature of land held upon the statutory trusts for sale. It is, however, asserted that, as a result of s. 28 of the Law of Property Act, 1925, the persons who are trustees and who hold the land on the statutory trusts are in such a position that any moneys arising from the sale became capital moneys and are applicable in the same way as if the money arose under the Settled Land Act, 1925. If that were the true effect of s. 28, s. 75, sub-s. 5, of the Settled Land Act, 1925, would apply, and there would accordingly be an equitable reconversion of the land, so that the effect of the legislation of 1925 would not be to deprive the devisee of these undivided shares.

That, I may add, appears to be the view taken by the learned editor of Wolstenholme and Cherry's Conveyancing Statutes (see vol. ii., 11th ed., p. 202), and appended as a note to s. 75, sub-s. 5; and see p. 276, where the learned editor writes: "There can be undivided shares in proceeds of sale, i.e., equitable interests in land which become capital money (Law of Property Act, 1925, section 28), and so can be treated as land." In support of that he refers to s. 75, sub-s. 5, of the Settled Land Act, 1925, and he adds: "Thus although a trust for sale operates to convert the land into personalty there is an immediate reconversion."

There are no doubt difficulties in accepting that view on the true construction of s. 28 of the Law of Property Act, 1925, for the section does not say that capital money arising

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from the exercise of a trust for sale shall be applicable as if it were capital money arising under the Settled Land Act: and it may be that there is some difficulty, on the language, in holding that s. 28 has the effect contended for before me and the effect mentioned in the passage from Wolstenholme. But for the decision of Clauson J. in *In re Price* (1), I should have reserved judgment on this point, in order to see if it were possible, by wide interpretation, to arrive at the result contended for. But in a case of this kind I should be quite wrong if I did not follow that decision.

In previous cases I have expressed the opinion that in construing this extraordinarily complicated legislation of the year 1925, it is most desirable that judges should follow any reported decision which seems to deal clearly with the point at issue. In *In re Price* (2) it became necessary for Clauson J. to decide and determine, as regards an undivided share in land, whether, as a result of the legislation of 1925, it remained land or became personal estate, and he seems to have decided quite clearly that the effect of the statutory imposition of a trust for sale was, so far as beneficiaries are concerned, to convert the land into money. That was a case where it was necessary to determine that question for the purpose of ascertaining the effect of the will of T. J. Price, who died a few days after January 1, 1926, when the Law of Property Act, 1925, came into operation. The learned judge said: "The result of this survey of the new Acts seems to show that on January 1, 1926, Thomas John Price ceased to have any estate in the fourteen acres or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres—namely, such interest as might be requisite for giving effect to his rights as a person interested in the land. In my opinion such an interest is an interest in personal estate. By the statutory imposition of a trust for sale the land has, so far as beneficiaries are concerned, been converted into money, and Thomas John Price has an interest in the money. This view of the effect of the Act seems to me not only to be sound in principle but to accord with such decisions

(1) [1928] Ch. 579, 590.

(2) [1928] Ch. 589.

as *Richards* v. *Attorney-General of Jamaica* (1); and *Frewen* v. *Frewen* (2), which recognize that the usual consequences of conversion follow whether the conversion is effected by agreement or compulsorily by Act of Parliament. The provisions with which I have to deal which turn a copyhold estate into a beneficial right in a fund arising under a trust for sale seem to me to be analogous to the provisions which notionally converted, in the one case cited, slaves, and in the other case cited, an advowson, each real property, into a money claim for compensation."

I think I am bound to follow that decision. It is true that a case of *In re Wheeler* (3) a decision of Tomlin J., is referred to. Tomlin J. himself examined the decision of Eve J. in *In re Mellish.* (4) It appears to me, however, that both *In re Wheeler* (3) and *In re Mellish* (4) are cases which do not decide the present point and do not really conflict with the decision of Clauson J. In *In re Mellish* (4) the testator devised all his share and interest in an estate known as the Rushall Estate in the county of Stafford. That interest was an undivided share, and, as I follow the decision of the learned judge, in those circumstances the effect of the Law of Property Act, 1925, was not to adeem the interest in the estate given to the person in question. In *In re Wheeler* (3) the only question was as to the effect on estate duty where an undivided share in land has become subject to a trust for sale. In that case, what the learned judge called a forcible argument was based upon s. 16, sub-s. 4, of the Law of Property Act, 1925, which is wholly irrelevant, I think, to the point which I have to determine here.

I therefore arrive at the conclusion that Clauson J. had necessarily to decide the present question of law, and in a reserved judgment has clearly expressed his view upon it and decided it, and that the other cases I have mentioned do not conflict with that decision.

Accordingly I shall follow *In re Price* (5), and shall decide that the undivided shares mentioned passed under the gift in the will contained of "all the personal estate" of the testator.

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(1) (1848) 6 Moo. P. C. 381.
(2) L. R. 10 Ch. 610.
(3) [1928] W. N. 225.
(4) [1928] W. N. 226.
(5) [1928] Ch. 579.

The Court then heard argument on the incidence of the funeral and testamentary expenses and pecuniary legacies.

H. H. King referred to *In re Lamb* (1) and *In re Petty.* (2)

H. B. Vaisey K.C. and *R. Gwyn Rees.* There is authority on the matter, but it is doubtful whether those cases cover the present case, where there is nothing more than a bequest of personalty subject to the payment of debts. The Administration of Estates Act, 1925, Sch. I., Part II., gives the order of the application of assets in the case of solvent estates. First comes property "undisposed of by will," and thirdly property "specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts." Even a fund specifically appropriated is not to be used for payment of debts until all property undisposed of has been used: see *In re Lamb.* (1) *In re Petty* (2) is a very much stronger case. There there was a distinct trust for payment of debts out of a fund which was a mixed fund of realty and personalty.

A. L. Ellis for the defendant James Reginald Buckley, representing next of kin. The question as to what property is undisposed of by the will must be considered apart from any reference to legislation. It is, in fact, three-sevenths of the estate after certain payments thereout. [He referred to Administration of Estates Act, 1925, s. 34, sub-s. 3.] The words "specifically appropriated" in para. 3 of Part II. of Sch. I. are used in opposition to what is called the "general personal estate."

MAUGHAM J. The question that arises seems to be one of considerable difficulty—namely, the true construction of s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and of Part II. of Sch. I. to that Act. By his will the testator, after a number of gifts which I need not relate,

(1) [1929] 1 Ch. 722.

(2) [1929] 1 Ch. 726.

and after having disposed of his freehold and copyhold property, provided as follows: [His Lordship read the provision and continued :] Two of the persons named predeceased the testator, and accordingly there is a lapse as regards three-sevenths of what in ordinary parlance would be described as the testator's residue. Before the Administration of Estates Act, 1925, came into force, there would have been no question at all as to the fund applicable for the payment of funeral and testamentary expenses and debts of the testator. The general personal estate, which would have included the leaseholds, would have been applicable for payment of those liabilities and the rule would have applied, even though some of the residue was undisposed of by reason of lapse; and the phrase, "the residue," which is so often found in wills, really only indicated what remained after payment of funeral and testamentary expenses, debts and, I may add, legacies.

The Administration of Estates Act, 1925, however, by s. 34, sub-s. 3, provides: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

When I turn to Part II. I find that the order of application of assets where the estate is solvent is as follows: "(1.) Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." I have no doubt that the language of that section is sufficient to include a lapsed share of residue, as has been decided by Eve J. in *In re Lamb*. (1)

Then we come to the next property applicable: "(2.) Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid."

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(1) [1929] 1 Ch. 722.

It is plain that the old law as to application of assets is there being altered to the detriment of people entitled upon an intestacy. Instead of ascertaining what for this purpose I will continue to call the residue by first paying debts and funeral and testamentary expenses, and then ascertaining what is to happen to the shares that are left, the lapsed shares and residue must now be treated as primarily applicable for payment of these liabilities.

Then come two further paragraphs, which I think are somewhat difficult to understand, in relation to the subject-matter. The third item of property is "Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts." The fourth is "Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to charge for the payment of debts."

Now in both of those cases it is to be noticed that the Legislature is assuming that the testator by his will has specifically appropriated in one case, or devised or bequeathed in the other, property for the payment of debts; or that he has charged with payment of debts specific property, or some property, under a general description, or devised or bequeathed property subject to a charge for payment of debts, and I cannot help concluding that those two paragraphs mean that the fact that the testator has done one of those things is not per se to constitute, to use the words of s. 34, sub-s. 3, a provision in the will which operates to alter the order of application which is specified in Part II. of the Schedule.

In the present case there is, I think, an indication that the leasehold property and the personal estate and effects of the testator, including his stocks and shares, etc., are being bequeathed subject to a charge for payment of debts; for a gift of property subject to payment of debts is a gift of property subject to a charge for the payment of debts. Accordingly this property of the deceased is, I think, being subjected to a charge for payment of debts within the meaning of the phrase as contained in para. 4 of Part II., and I conceive that that is not to affect the circumstance that under para. 1 of Part II. the property of the deceased undisposed of by will is primarily to be applied in payment of these particular liabilities, funeral and testamentary expenses and debts.

There is no doubt some difficulty in coming to that conclusion, inasmuch as what the testator is really dealing with is a residue, but I think the consideration which I have mentioned as to the consequences of paras. 3 and 4 of Part II. of the Act bind me to follow the order of application mentioned in Part II., notwithstanding the fact that there is some indication of a contrary intention in the will of the testator.

In *In re Petty* (1) Astbury J. came to the conclusion that there was there language which clearly threw the debts and funeral and testamentary expenses on a mixed fund of real and personal estate. I am not sure that his attention was called to the effect of paras. 3 and 4 of Part II. of Sch. I. to the Act of 1925. However that may be, I do not think the case is exactly in point. There is no such clear expression of intention as to cause me to neglect the indication which, as I have said, I gain from paras. 3 and 4 of Part II. of the Schedule ; and I must therefore follow what I conceive to be the principle involved in the decision in *In re Lamb* (2) as well as the true construction of the statute or the relevant provisions of it which are involved in the present case.

I therefore hold that these particular liabilities fall to be paid out of the undisposed of shares of residue.

K. R. A. H.

C. A.

The defendant, J. R. Buckley, appealed on this point, and the defendant, Charles Henry Kempthorne, appealed on the first point decided by Maugham J. The appeals were heard on October 21, 22 and 23, 1929. The defendant Buckley's appeal was first argued.

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(1) [1929] 1 Ch. 726. (2) [1929] 1 Ch. 722.

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Fergus Morton K.C. and *A. L. Ellis* for the appellant Buckley. Maugham J. was wrong in holding that the testator had not expressed an intention with regard to the mode of payment of his debts, which varied the order of application provided for in Part II. of Sch. I. to the Administration of Estates Act, 1925. The testator has provided for the payment of debts and funeral expenses out of residue before the net residue is divided amongst his brother and sisters. Although the gifts in respect of the three-seventh parts of the net residue have failed, these parts cannot be treated as primarily liable for the payment of the debts, for under the scheme of the will the shares of net residue are never ascertained until the debts have been paid out of the gross residue. Maugham J. recognized that if the will stood alone the debts would have been payable out of gross residue, but he felt prevented from so deciding by s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and Part II. of the Schedule. But the answer is that the lapsed shares are not ascertained until the debts have been paid.

The authorities dealing with the provisions of Part II. of the Schedule are *In re Lamb* (1); *In re Petty* (2); and *In re Atkinson.* (3)

In re Lamb (1) decided that debts are payable out of lapsed shares of residue when the only direction given by the testator as to the payment of debts is a general direction that they should be paid as soon as possible after his decease. Nothing was there said by the testator as to the fund out of which the debts were to be paid. That distinguishes that case from the present. Here the testator has gone much further. It is not necessary for the appellant to contend that *In re Lamb* (1) was wrongly decided. Here you cannot arrive at what is undisposed of until the debts have been paid, and that is so because the testator has said so.

The present case is like *In re Petty* (2), where it was held that the order of administration prescribed by Sch. I., Part II., had been varied by the provisions of the will. The principle

(1) [1929] 1 Ch. 722.

(2) [1929] 1 Ch. 726.

(3) [1929] W. N. 189; since reported [1930] 1 Ch. 47.

of that case applies to the present. In both cases there was only a gift of what was left after payment of debts.

In re Atkinson (1) was not a precisely similar case to the present. It was the case of the lapse of a specific devise, and there was therefore no difficulty in ascertaining what was undisposed of.

Reliance is here strongly placed on the use of the words "after payment" of debts, etc., as showing that there was to be no division of the residue until after the debts had been paid.

[They also referred to s. 53, sub-s. 3, of the Administration of Estates Act, 1925.]

Vaisey K.C. and *Gwyn Rees* for the respondents Mrs. Gaskell and Mrs. Lewis. The lapsed shares are "property of the deceased undisposed of by will" within the meaning of para. 1 of Part II. of Sch. I. of the Act of 1925, and are, therefore, the primary fund for the payment of the debts in exoneration of the other shares of residue. There are no provisions in this will modifying the order of application of assets in payment of debts within s. 34, sub-s. 3, of the Act. It is true that the testator has directed payment of debts out of gross residue, but that is not enough to alter the order of application of assets, having regard to the fact that in Part II. items 3 and 4 in the order of assets are property specifically bequeathed for and charged with the payment of debts respectively. A testator would in the nature of things make no provision as to the application of "undisposed of" property.

[RUSSELL L.J. It is not until after payment of debts that anything is given by the will.]

That is immaterial, for that direction only causes the whole residue to stand in position 4 of the order of application of assets for payment of debts, and property undisposed of is in position 1.

In re Petty (2) is distinguishable from the present case. There the testator directed first the payment of his debts and then the division of the residue. The order of application of assets prescribed by the Act should be adhered to.

(1) [1929] W. N. 189; since reported [1930] 1 Ch. 47.

(2) [1929] 1 Ch. 726.

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[RUSSELL L.J. Your argument makes the testator give the residuary legatees something more than the will gave them. If that be the effect of applying Part II. of the Schedule, does it not show that the provisions of the will are inconsistent with it ?]

The words of Part II. of the Schedule are descriptive of the testator's gross property, for in Part II. it is assumed that none of the debts have been paid.

The effect of the decision in *In re Lamb* (1) is to throw the debts and legacies on the lapsed shares of gross residue.

The question is to what does para. 1 of Part II. of the Schedule refer, and it is submitted that it refers to a share of gross residue that is undisposed of. It must refer to a share of gross and not net residue, because ex hypothesi the debts have not been paid. This case is really covered by *In re Lamb* (2), which this Court ought to follow.

Grant K.C. and *W. F. Swords* for Charles H. Kempthorne.

H. H. King as amicus curiae referred to the words "contained in his will," in s. 34, sub-s. 3, and suggested that the Schedule was intended to be applied with reference only to the condition of the estate at death and the actual provisions of the will, without regard to any supervening ineffectiveness of any such provision occasioned by the death of a legatee. On that basis the Schedule would be treated as supplementing the will where a testator had not fully prescribed the order of application, the difficulties of interpretation would disappear, and the only difficulty remaining would be as to the reason why the Legislature should have postponed categories 3 and 4 in the Schedule to categories 1 and 2, with which difficulty the Court was not primarily concerned. This would involve overruling *In re Lamb* (1), but that case is not binding on this Court.

Morton K.C. replied.

Cur. adv. vult.

The arguments in the appeal by Charles Henry Kempthorne were then heard.

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(1) [1929] 1 Ch. 722.

Grant K.C. and *W. F. Swords* for the appellant. The undivided shares of land passed under the devise of freehold and copyhold property, and that part of the gift was not adeemed by the operation of the Law of Property Act, 1925. The effect of Sch. I., Part IV., of the Act was to cause the entirety of the land to be held on the statutory trusts as defined in s. 35. The result was that the land was to be held on trust for sale, and the proceeds of sale were to be held "upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons . . . . interested in the land." The result was to convert the testator's undivided shares on January 1, 1926, into an equitable interest in the proceeds of sale, but the conversion so effected did not operate as such for the purpose of devolution. The intention of the Legislature was to create machinery for disposing of land easily, but not to change the nature of the property or its devolution. The terms of s. 34, which prevents the creation of undivided shares of land for the future, and s. 36, which relates to joint tenancies, show that the Legislature did not intend to interfere with beneficial interests. Moreover, after imposing the trust for sale, s. 35 still refers to the beneficiaries as "persons interested in the land," and the same expression occurs repeatedly in Sch. I., Part IV. Therefore the beneficiaries are still to be treated as persons interested in land, and their interests therefore devolve as realty.

[RUSSELL L.J. The appellant's difficulty is that the trust for sale operated as a conversion and that there is nothing in the statute to cause a reconversion.]

On the true view there never has been a conversion, because under s. 28, sub-s. 1, of the Law of Property Act, 1925, money realized under the trust for sale is called capital money, and retains the quality, therefore, of the property from which it originated. Sect. 28, sub-s. 1, confers on trustees for sale all the powers of a tenant for life and trustees under the Settled Land Act, 1925, which include a power to reinvest in land. Further, by the Settled Land Act, 1925, s. 75, sub-s. 5, capital money retains the quality of land for the purpose of devolution.

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That provision applies to the proceeds of sale arising on the exercise of a trust for sale having regard to their being called capital money: see also s. 27, sub-s. 2, which speaks of "the proceeds of sale or other capital money."

[RUSSELL L.J. Is not the expression "capital money" used solely to distinguish capital from income?]

It is submitted not.

[LORD HANWORTH M.R. The amendment to s. 35 made by the Law of Property (Amendment) Act, 1926, causes capital money arising under a trust for sale to be treated in certain specified cases only as capital money arising under the Settled Land Act, 1925. How can it be given this meaning in other cases?]

The statutes use "capital money" in all cases as a term of art to mean capital money within the Settled Land Act. So under s. 16, sub-s. 4, of the Law of Property Act rights in regard to duties are to be left unaffected by the imposition of the statutory trust for sale.

[RUSSELL L.J. There is no similar provision in regard to devolution.]

That is involved in the use of the words "capital money" in conjunction with s. 75, sub-s. 5, of the Settled Land Act, 1925: see also s. 36, sub-s. 4, of the latter Act.

[LORD HANWORTH M.R. Capital money arising under the Settled Land Act is defined in s. 117, sub-s. 1 (ii.), of that Act.]

Turning to authorities, the case relied on by Maugham J. in deciding this case is *In re Price* (1), but there the question of ademption was not being considered. On that question the only authorities are *In re Wheeler* (2) and *In re Mellish* (3), and they support the appellant's contention. This case is almost directly within *In re Wheeler.* (2)

Vaisey K.C. and *R. Gwyn Rees* for two persons interested in personalty were not called upon.

Fergus Morton K.C. and *A. L. Ellis* for another person interested in personalty.

H. H. King for an executor.

(1) [1928] Ch. 579.
(2) [1928] W. N. 225.
(3) [1928] W. N. 226.

LORD HANWORTH M.R. I think this appeal fails. It arises from a decision of Maugham J., who had to give certain directions and decisions upon an originating summons which was taken out for the purpose of interpreting the will of Lewis John Kempthorne. Mr. Kempthorne died on August 15, 1928. His will was made on December 2, 1911, and he made a codicil on June 17, 1918.

The appeal is on behalf of Mr. C. H. Kempthorne, who was the testator's brother. In the will there is this devise: "I devise to my said brother Charles Henry Kempthorne, his heirs and assigns all my freehold and copyhold property." At the date of his death the testator was possessed of an interest under his father's will. It was an equitable two-ninths shares of freehold and copyhold property passing under the will of his father, James Kempthorne, who died in 1899. He also had a legal interest, consisting of an undivided one-fourth share in certain freehold mines which he had purchased; and he had, apart from that, some freehold property which was his own absolutely, and which is not in question in this case.

The total value of the property in question in this case is 16,200*l*. Maugham J. has decided that by virtue of recent legislation this freehold and copyhold property has been turned into personal property, and passes not under the devise I have read, but under the subsequent bequest of personal estate and effects. It is said that if this be the effect of the recent legislation, it inflicts a great hardship on Mr. Charles Henry Kempthorne. We do not know, and it is not right for us to speculate, whether or not this testator had considered the effect of the recent legislation, and decided to leave his will as it was. All we know is that the Law of Property Act, 1925, came into force on January 1, 1926; and that the death of the testator did not take place until August 15, 1928, and during that time, although he was a solicitor, he made no alteration in his will. This case may, however, be an indication that it is wise for persons to review their wills in the light of recent legislation.

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The terms of the devise are of the simplest. It is a devise of "all my freehold and copyhold property." Mr. Grant admits that as the testator owned some small freehold property apart from the undivided shares, there is an adequate purpose for those words in the will. But apart from that, we are dealing broadly with the effect of recent legislation upon the nature of freehold and copyhold property held in undivided shares. It is admitted that when property is subjected to a trust for sale a conversion is effected of the property to be sold into personal property. It is also admitted that at the time of the commencement of this Act the copyhold or freehold land with which we are dealing was not settled land.

It is necessary to examine the effect of the Law of Property Act, 1925. Part IV. of the first Schedule to that Act, begins: "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—(1.) If the entirety of the land is vested in trustees or personal representatives . . . . in trust for persons entitled in undivided shares, then . . . . (*b*) . . . . the land shall be held by such trustees or personal representatives upon the statutory trusts." This land is caught by those operative words in the Schedule, and it is held, therefore, upon statutory trusts. Sect. 35 tells us what these statutory trusts are: "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land." It is plain that the freehold and copyhold land of which the testator had an equitable two-ninths share, and the freehold mines of which he had a legal one-fourth share, are property to which these provisions apply, and

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which, therefore, were subjected to a trust for sale; and the trust for sale by the ordinary law causes a conversion into personalty.

Some effort has been made (and not at all an unworthy effort) on the part of Mr. Grant and Mr. Swords, to point out that in s. 35, as well as in Sch. I., Part IV., use is made of the word "land" at a time after the trust for sale has been imposed. But the point is this. Sect. 35 opens: "For the purposes of this Act land held upon the 'statutory trusts'"; and it ends with a statement of how the proceeds of sale are to be dealt with so as to give effect to the rights of persons interested in the land. What land? The land which was subject to the "statutory trusts." I do not think from the use of the word "land" scattered over some of these sections and in the Schedule, it can be held that there was an intention in the Act to treat the proceeds of sale as realty and not converted under the trust for sale into personalty.

But it is said that in other sections there are indications that the proceeds of sale under the statutory trusts are to be treated as realty. As an illustration of this, reference is made to s. 28, which deals with the powers of management conferred on trustees for sale. That section has been amended, and our attention was called to the amendment, which confers enlarged powers of management in certain cases. It is said that powers conferred by s. 28 are to operate upon the proceeds of sale and prevent conversion. But it appears to me that s. 28 is passed alio intuitu. It has no reference to revoking or altering the natural effect in law of a trust for sale which operates to effect conversion. Again, in s. 16, sub-s. 4, it is provided that: "Nothing in this Act shall alter any duty payable in respect of land." For the purposes of the Revenue the land remains land; and the Revenue are not to have their rights altered by the trust for sale. Sub-ss. 4 and 5, and s. 16, however, appear to me not to favour the argument of the appellant, because, although they show that a definite statutory provision was thought necessary for protecting the Revenue there is in no part of the Act a statement that s. 35 is not to operate as a conversion for other purposes. It is said, however, that there is in the Settled Land Act, 1925, such a provision. Sect. 75, sub-s. 5, provides: "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land." That is a definite provision relating to capital money arising under the Settled Land Act. A definition of "capital money arising under this Act," is to be found in the interpretation section. Sect. 117, sub-s. 1 (ii.), provides: "'Capital money arising under this Act' means capital money arising under the powers and provisions of this Act or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement and includes securities representing capital money." When that definition is read into s. 75, sub-s. 5, I think it clear that sub-s. 5 cannot be treated as applicable to the property or proceeds of property that we have to deal with, because the definition makes it clear that this property is not brought within the ambit of s. 75, sub-s. 5.

I would add that as sub-s. 5 provides that capital money under the Settled Land Act "shall for all purposes of disposition, transmission and devolution be treated as land," it is remarkable that the Law of Property Act, 1925, contains no such provision. Having regard to the fact that these statutes were passed in the same year, and, indeed, almost at the same time, so that there is a connection between them, it is remarkable that in the Law of Property Act there is no provision re-converting the proceeds of sale into realty or preventing the realty becoming, as it does under the ordinary law, personalty.

We have to apply to the devise of "all my freehold and copyhold property" in this will the law contained in the Law of Property Act, which subjects property held in undivided shares to a trust for sale, and thus converts it into personalty. Maugham J., in his judgment, with which I entirely concur (and, indeed, to which I should have added nothing, save for the careful argument that we have had presented to us) has decided in this sense, following the judgment of Clauson J. in *In re Price.* (1) He cited and followed this passage in the judgment of Clauson J.: "The result of this survey of the new Acts seems to show that on January 1, 1926, Thomas John Price ceased to have any estate in the fourteen acres or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres." I, like Maugham J., desire to adhere to what is said by Clauson J. in that passage.

There remain two other cases which have been cited to us. One is *In re Wheeler* (2), and the other is *In re Mellish* (3), which is referred to in *In re Wheeler.* (2) Neither of those cases to my mind covers the point that we have to decide. In *In re Mellish* (3) Eve J. held that there was an effective devise, which was not altered by the Law of Property Act. The terms of the devise there were, "All his share and interest in an estate known as the Rushall estate in the county of Stafford to the defendant Buchanan in fee-simple." Eve J. held that those words were sufficient to constitute a definite devise of the undivided shares of that estate which had belonged to the testator, and took effect as a bequest of all the testator's interest therein and the proceeds of sale thereof. In *In re Wheeler* (2) Tomlin J. held that the words in the case before him were sufficiently similar to those in *In re Mellish* (3) to justify his deciding in the same way as Eve J. The gift in that will was of the testator's interest "in an undivided moiety of the real estate in the County of York." Tomlin J. held that s. 16, sub-ss. 4 and 5, operated, and that Sir Delaval Cotter took the estate indicated and was bound to repay under sub-s. 5 of s. 16, the duty which had been paid in respect of it.

Those two cases are to my mind based upon the interpretation given to the gifts in the two wills which the two learned judges found to be specific bequests. We, however, have to deal with a devise in general terms of "All my

(1) [1928] Ch. 579, 589.

(2) [1928] W. N. 225.

(3) [1928] W. N. 226.

freehold and copyhold property." Those general words must be construed in accordance with the directions of the Legislature in the new statutes. Inasmuch as the land in which the testator owned undivided shares is subjected to a trust for sale, the general devise is not adequate to cover the proceeds of sale. The property has been turned into personalty, with the result that this devise fails.

Lord Hanworth M.R.

I do not know what the intention of the testator was, but we have only to determine the effect of the legislation; and in my view Maugham J. was quite right in his judgment, and rightly followed Clauson J. Therefore, I think that this appeal must be dismissed.

LAWRENCE L.J. I agree. Maugham J., in deciding this case, followed the decision of Clauson J. in *In re Price.* (1) In that case Clauson J., after carefully and exhaustively reviewing the provisions of the new Acts, came to the conclusion that the statutory imposition of a trust for sale operated to convert an undivided share of real estate into a corresponding share of the proceeds of sale of the entirety, and accordingly that as from the passing of the Act of 1925 the interest of the owner of the undivided share became personal estate and passed as such. I agree with Clauson J. that this is the true effect of the recent legislation in the case of an unsettled undivided share of real estate. It follows, therefore, that on January 1, 1926, before the will in the present case became operative, the testator's undivided shares in question ceased to be "freehold property," and on his death they passed under the bequest of his personal estate.

Mr. Grant contended that the decision in *In re Price* (1) was wrong, and that the undivided shares in question remained "freehold property." In support of this contention he relied on the provisions of s. 28, sub-s. 1, of the Act of 1925. That section, however, so far from supporting his contention tends in the opposite direction. It recognizes the distinction between settled land and land held upon trust for sale, and, in the concluding words of the first paragraph, negatives the

(1) [1928] Ch. 579.

idea that the proceeds of sale under a trust for sale should devolve in the same manner as capital money arising from a sale of settled land. It enacts in terms that all capital money arising under the powers which the trustees might exercise under s. 28 should (unless paid or applied for any of the purposes authorized by the Settled Land Act, 1925) "be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale"; and the sub-section goes on to provide that all land acquired under this sub-section (that is to say, by the exercise of any of the powers thereby conferred) should be conveyed to the trustees on trust for sale; thus drawing a sharp distinction between capital money arising from a sale of land under a trust for sale and capital money arising from a sale of settled land (whether consisting of an undivided share or of the entirety) under the provisions of the Settled Land Act, 1925. In the latter case, s. 75, sub-s. 5, of the Settled Land Act, 1925, provides that the proceeds of sale shall devolve in the same manner as the land from which such proceeds arise would have devolved, whereas in the case of a sale under the statutory trust for sale there is no provision to be found in either of the Acts which operates to re-convert the proceeds into land.

Mr. Grant admitted that prima facie s. 35 of the Law of Property Act, 1925, operated to convert the undivided shares in question into personalty. After having carefully considered all the provisions to which our attention has been called I find nothing in the Acts which displaces that prima facie conversion. As the only question we have to decide is whether at the date of the death of the testator the undivided shares in question partook of the quality of freehold property or of personal property it follows from what I have said that there is no escape from the conclusion that they partake of the latter character and that the decision of Maugham J. was right.

RUSSELL L.J. I am of the same opinion. On the coming into force of the Law of Property Act, 1925, the freehold property of the testator which is in question here became vested in trustees upon the statutory trusts. It is sufficient to say that the statutory trusts include an imperative trust for sale. The result is, that prima facie the freehold property which he formerly owned became converted into part of his personal estate, unless we can find in the Act which effects the conversion some provisions which bring about a re-conversion, or prevent the ordinary operation of the imperative trust for sale. I am unable to find any such provision in the Act in question. Reliance was placed upon s. 28; but as I read that section, all that it does, so far as the present case is concerned, is to confer upon the trustees for sale the powers given to a tenant for life, or the trustees of a settlement under the Settled Land Act, 1925. But it is careful to provide that, in so far as the capital money which they may receive is not paid or applied for any purposes authorized by the Settled Land Act, 1925, all capital money is to be applicable in the same way as if the money represented proceeds of sale arising under the trust for sale. It further goes on to provide that if in the exercise of any of the powers given by that section, the money or any part of it is invested in land, that land is to be conveyed to the trustees on trust for sale. So I can get no assistance from the section in favour of the view that conversion has not been effected.

In the next place, reliance was placed upon the presence, at the end of s. 35, and in other places, of the words "interested in the land," and it was said that by these words the statute showed that the former owner of an undivided share in freehold property was, notwithstanding the imperative trust for sale, still to remain interested in the land. And, therefore, it was contended that his property continued to be freehold property, and had not been changed into personal estate. I am unable to accept that view. There is no doubt that he is interested in the land; but his interest has ceased to be freehold property, and has become personal estate. To borrow an old phrase, frequently used in another connection, his interest, though an interest which savours of realty, is none the less personal estate.

That being so, the next question which arises is what is the effect of the Act upon the disposition made by this testator in his will ? That has been called the ademption point ; but I am not sure that that is a strictly accurate description. The position is this. The testator has died leaving a will in which he makes a disposition in general terms of " all my freehold property," and also makes a general disposition of all his personal estate. The question is which of those two dispositions carries this particular interest of the testator ? When once the conclusion is reached that the effect of the Act is to turn his freehold property so far as it consisted of undivided shares into personal estate, there can be only one answer to the question—namely, that the property passes under the general gift of the testator's personal estate.

I desire to add nothing to the judgment of Clauson J. in *In re Price* (1), which was adopted and approved of by Maugham J. in his judgment in the present case.

As regards the two other cases which Mr. Grant relied upon, the cases before Eve J. and Tomlin J., they are in my opinion distinguishable. So far as *In re Mellish* (2), the case before Eve J., is concerned, the terms of the disposition contained in the will under consideration were such as to cover the interest, whether it was freehold property or whether it was personal estate. The gift there was of " all the testator's share and interest " in a certain estate. In *In re Wheeler* (3), the case before Tomlin J., the distinguishing feature, in my opinion, was that although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will ; so that his testamentary disposition had to be treated as one made at the date of the codicil. The learned judge must necessarily have taken the view that, when the testator used that language, he must have been intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in the county of York.

(1) [1928] Ch. 579.
(2) [1928] W. N. 226.
(3) [1928] W. N. 225.

Those two cases are in my opinion distinguishable; but if they do by any chance conflict with the decisions of Clauson J. in *In re Price* (1) and of Maugham J. in the present case, I prefer their views to any views inconsistent with them, which may be involved in the decisions in the other two cases.

For these reasons, I agree that the appeal fails and must be dismissed.

H. C. G.

Nov. 1. The following written judgments were delivered on the defendant Buckley's appeal:—

LORD HANWORTH M.R. This is an appeal from an order of Maugham J. made upon the second question propounded in an originating summons before him, dated March 4, 1929, taken out to obtain decisions as to the true meaning and effect of the will and codicil of Lewis John Kempthorne deceased. The testator made his will on December 2, 1911, and added a codicil to it dated June 17, 1918; and he died on August 15, 1928.

The portion of his will in question upon the present appeal is as follows: "As to all my leasehold property and all my personal estate and effects, including my stocks and shares and all money due to me on debentures and mortgages of or to which I shall be possessed at the time of my death, subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and the duty on any legacies bequeathed free of duty, the same shall be divided into seven equal parts." Then follow the names of five persons, who were the brother and four sisters of the deceased, and who are to be the recipients of the seven fractions. To two of the sisters he gave two-sevenths and to each of the others one-seventh.

Two of the persons so named died after the date of the codicil but before the testator, with the result that there is a lapse of three-sevenths of the fund to be divided. His sister, Elizabeth, died between the date of the will and the codicil; and her share was given by the codicil to be equally divided between her son and daughter. The terms of the codicil, which are relied upon as indicating the intention of the testator, are as follows: "And whereas by my said will I bequeathed to my sister Elizabeth one-seventh part of my leasehold property and personal estate and effects after certain payments had been made thereout."

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(1) [1928] Ch. 179.

Maugham J. found the case one of difficulty because of the terms of the Administration of Estates Act, 1925, which drove him to the conclusion that he reached. Before that Act came into force, as he says, there would have been no question as to the fund applicable for the payment of the funeral and testamentary expenses and debts of the testator. The personal estate in its entirety would have been applicable for payment of them, and that notwithstanding that some of the residue became undisposed of by reason of the lapse of the three-sevenths.

Before dealing with the effect of the Act, it is important to come to a definite conclusion as to the meaning of the terms of the will and codicil. Maugham J. finds the terms explicit in regard to the legacies. He holds that they clearly indicated that the payment of the legacies is to be completed before the divisible fund is created; and he holds that the terms of the Act do not apply, because the fund is not ascertained until after payment of the legacies. It is clear, therefore, that upon the question of the legacies the learned judge attached importance to the word "after," as indicating the point of time at which the fund is to be ascertained. I agree in this view: but it seems to me that the same reasoning applies to the same word in relation to the payment of the expenses and debts. In this interpretation, the terms of the will are explicit and the fund, or net residue, is not ascertained—does not come into being—until the expenses, debts, and legacies have been paid.

Astbury J. held, in *In re Petty* (1), that in such a case, where the terms of the will are clear and provision is made for payment of the expenses, debts and legacies out of a fund created by the will, there is no room for the application of the Administration of Estates Act to disturb the directions of the will. I agree with this decision, and think that the principle on which it was decided applies in the present case. See also *In re Atkinson* (1), per Clauson J.

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(1) [1929] 1 Ch. 726.

The difficulty arising from the Act which caused Maugham J. to decide otherwise is this. By s. 34, sub-s. 3, it is provided: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act." The estate is solvent here; and Part II., para. 1, directs: "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." Eve J. decided in *In re Lamb* (2) that a share of residuary estate which lapses is "property undisposed of by will." We have had no argument upon the point of that case, and it is unnecessary to come to a final conclusion upon it, for that decision is not relevant upon the point whether the provisions of the will exclude the operation of the Schedule.

Maugham J. would have given effect to the terms of the will, but for paras. 3 and 4 of the Schedule. He held that a specific appropriation of property for the payment of debts referred to in para. 3 and a charge upon property, or a devise or bequest of property subject to a charge for the payment of debts in para. 4, indicated that where such an appropriation or charge had been made by a will, it was not to be taken as a contrary provision in the will excluding the operation of those two paragraphs; but rather as directions in the will which were to be the foundation of the operation of those paragraphs. My own view, however, is that those paragraphs operate where the payment of debts is specifically charged upon some particular property, or where some property is dealt with and subjected to the payment of the debts; and that they do not operate to override or prevent the creation of a general fund or residue which is to be ascertained, and does not come into being, until after the payment of the expenses and debts and legacies, and legacy duty, if any.

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(1) [1929] W. N. 189; since reported [1930] 1 Ch. 47.
(2) [1929] 1 Ch. 722.

The result is that in my opinion the terms of the will do exclude the operation of the Schedule; and that there is no such appropriation or charge as is indicated in paras. 3 and 4 of it; and I find myself free from the difficulty which pressed upon Maugham J.

The appeal will be allowed, and a declaration made as to the payment of the funeral and testamentary expenses and debts of the testator, and a direction as to the costs here and below, which will be stated by Lawrence L.J.

Lawrence L.J. In this case Maugham J. has held that the funeral and testamentary expenses and debts of the testator ought to be paid out of the lapsed shares of his residuary personal estate in exoneration of the other shares of residue. The learned judge has felt himself constrained to come to this conclusion by reason of the order of application of assets prescribed by Part II. of Sch. I. to the Administration of Estates Act, 1925, notwithstanding that under s. 34, sub-s. 3, of the Act such order of application is only to take effect subject to the provisions contained in the will of the testator, and that the will in the present case contains an express provision that the residuary personal estate is only to be divided into shares subject to and after payment of his funeral and testamentary expenses and debts.

The reasons given by the learned judge for his decision, shortly stated, are that the first item of property in the Schedule includes a lapsed share of residue which therefore comes in order of application before property by the will specifically appropriated for payment of debts and before property by the will charged with or bequeathed subject to a charge for the payment of debts; thus in the opinion of the learned judge showing that such an appropriation or charge expressed in a will is not considered by the Legislature to be a provision overriding the order of application of the first and second items in the Schedule within the meaning of s. 34, sub-s. 3. The learned judge has further concluded that as in the present case the testator has bequeathed his personal estate subject to and after payment of his debts, it is property coming within the fourth item in the Schedule.

In deciding that the first item in the Schedule includes a lapsed share of residue, the learned judge has followed the decision of Eve J. in *In re Lamb*. (1) I am not at present convinced as to the correctness of this decision. The residue of personal estate is what remains after payment of funeral testamentary and administration expenses, debts and legacies. It is obvious, therefore, that in the case of a lapsed share of residue, there is nothing undisposed of, except what remains after payment of the expenses, debts and legacies; until these are paid, there is no net residue at all, and it is impossible to say what (if anything) has lapsed. Moreover the Act is dealing with the application of the assets of the testator; and it is open to question whether a share of residue which does not come into existence and cannot be ascertained until the expenses, debts and legacies are paid, can properly be described as an asset of the testator for the payment of his debts any more than a pecuniary legacy can properly be so described. At the date of the Act coming into force it had been firmly established by a long line of authorities that a share of residue (whether undisposed of by reason of lapse or because the legatee was incapable of taking) bore only its proportion of expenses, debts and legacies rateably with the other shares. There is much force in the argument that, as regards the order of application of assets, the Act on its proper interpretation intended no more than to place real property on the same footing as personal property, and did not otherwise alter the order of application. Had it been necessary for our decision in the present case to arrive at a definite conclusion on this point, I should have desired to have the

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(1) [1929] 1 Ch. 722.

Lawrence L.J.

question more fully argued. Mr. Morton, whilst not admitting that a lapsed share of residue fell under the first item of property in the Schedule, contented himself with assuming that *In re Lamb* (1) was rightly decided; and rested his case solely on the express provisions of the present will. As in my judgment *In re Lamb* (1) is distinguishable from the present case, I prefer to reserve my opinion on the question whether it was rightly decided. In *In re Lamb* (1) the testator by his will appointed executors and trustees, and directed that all his just debts, funeral and testamentary expenses should be paid by them as soon as possible after his decease; after such appointment and direction, he proceeded to make a specific devise and some specific and pecuniary bequests, and then directed that the residue of his real and personal estate should be equally divided between certain named persons. The provision as to the debts, funeral and testamentary expenses in that case amounted in effect to nothing more than a direction to pay them in a due course of administration, and there was no such express provision as occurs in the present will.

I agree with Maugham J. that the introduction into the Schedule of the third and fourth items of property (to be applied in that order) might in some cases create a difficulty in determining the true effect of the words "subject to the provisions, if any, contained in his will," in s. 34, sub-s. 3, as an express provision contained in a will that property should be appropriated or be subjected to a charge for the payment of debts would prima facie appear to indicate an intention inconsistent with the order of application contained in the Schedule which places property undisposed of and property included in a residuary gift as the first and second items to be resorted to for the payment of expenses and debts. I do not, however, agree with the learned judge that this difficulty arises in the present case; or that in the present will any property is bequeathed subject to a charge for the payment of debts within the meaning of para. 4 of the Schedule.

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(1) [1929] 1 Ch. 722.

Under the provisions of s. 34, sub-s. 3, and the Schedule, property included (either by a specific or general description) in a residuary gift would have to be exhausted before the property comprised in either the third or the fourth item could be resorted to. It follows that the property mentioned in paras. 3 and 4 of the Schedule cannot comprise property included in a residuary gift, either under a specific or general description. The third and fourth items of property must, therefore, be read as referring to property other than property included in a residuary gift. In the present case the personal estate charged with the payment of debts is property included in a residuary gift, and clearly comes within the second item of property in the Schedule. The result is that there is no such property as is described in either the third or fourth item in the Schedule; and, therefore, the Court is not concerned with the problem which would have arisen if there had been any such property.

The language of s. 34, sub-s. 3, and of para. 8 (*a*) of the Schedule shows that the Legislature did not intend (except possibly in cases where there is property coming within the third and fourth items) that the order of application of assets contained in the Schedule should override the express directions contained in the will; and I agree with the view expressed by Astbury J. in *In re Petty* (1) that the statute did not intend to interfere with a testator's right to deal with his own estate as he liked. In the present case we find that the testator expressly makes the whole of his personal property, which he bequeaths in the form of a residuary gift, subject to the payment of his funeral and testamentary expenses, debts and legacies; and only directs a division of his residuary personalty into shares after those expenses, debts and legacies have been paid. Consequently, the only bequest to each residuary legatee is a bequest of a share in the net residuary personalty remaining after the payment thereout of the funeral and testamentary expenses and debts and legacies.

Even assuming, therefore, that the first item in the Schedule includes a lapsed share of residue, there is in the present will an express direction that the expenses and debts are to be borne by the whole of the testator's personal estate; which direction overrides the order of application of assets in the Schedule and must be carried out. The result of this is that the shares of residue undisposed of by reason of lapse will bear only their proportion of the expenses and debts rateably with the other shares.

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(1) [1929] 1 Ch. 726, 730.

For the reasons stated I agree that the appeal should be allowed.

RUSSELL L.J. In order to answer the questions submitted for our consideration on the hearing of this appeal, the first thing to do, is to ascertain whether the testator's will contains any and what provisions relating to the discharge of his funeral, testamentary and administration expenses, debts and liabilities. If such provisions exist in the will, they will control the operation of s. 34, sub-s. 3, of the Administration of Estates Act, 1925.

The testator in the present case has made, as it seems to me, a particularly clear provision by his will. As to all his personal estate he directs that, subject to and after payment of his funeral and testamentary expenses and debts and legacies it is to be divided into seven equal parts, which he bequeaths to five named persons in unequal shares. There is no gift to any of those persons except of a share of the balance of the general personal estate remaining after the expenses and debts and legacies have been borne and paid out of the entirety thereof. If the words used in the will left any doubt on this score (which they do not) the doubt would be removed by the codicil, which recites that by his will the testator had bequeathed to his sister Elizabeth "one seventh part of my . . . . personal estate and effects after certain payments had been made thereout."

In the circumstances of the present case I fail to see how Part II. of Sch. I. can come into play as regards the real and personal estate of this testator. The statutory order of application of assets is overriden by the testator's own provisions, the effect of which is (to put the result in

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another way) that the only personal estate as to which he has died intestate is a share of what personal estate remains after the expenses and debts have in fact been paid thereout.

As I read the judgment of Maugham J. its foundation is this: that although s. 34, sub-s. 3, of the Administration of Estates Act, 1925, is stated to be subject to the provisions, if any, contained in the will of the deceased person, yet the provisions contained in this particular will are not strong enough to negative the operation of the sub-section. He argues thus: that a consideration of paras. 3 and 4 of Part II. of Sch. I. indicates that even if a testator has made a disposition of property, as described in paras. 3 or 4, nevertheless the property described in para. 1 must first be applied; this shows that a disposition of property as described in para. 4 will not be a provision contained in the will strong enough to negative the operation of the sub-section. He then states that the provision contained in this will is a disposition of property as described in para. 4, and that, accordingly, he is driven to hold that it is ineffective to override the sub-section. That is the reasoning of the judgment as I read it.

In my opinion, however, the learned judge erred in treating the provision made by this testator as being a disposition of property as described in para. 4 of Part II. of Sch. I. Neither para. 3 nor para. 4 can apply or be intended to apply to a disposition of a general or residuary nature: because the operation of the Schedule is such that resort is not to be had to the items covered by paras. 3 and 4 until all property of the deceased comprised in a residuary gift has been exhausted. Thus the reason which compelled Maugham J. to decide as he did had, as I construe the Schedule, no foundation in fact. For these reasons I would allow the appeal.

I would add that the appeal was argued on the assumption that para. 1 of Part II. of Sch. I. applies to a lapsed share; but this case involves no decision on that particular point, which in this Court remains open for decision.

LAWRENCE L.J. The order we make is as follows: Discharge Maugham J.'s order in so far as it declares that the funeral and testamentary expenses and debts ought to be paid out of lapsed shares of residue and in so far as it declares that the legacies ought to be paid out of the testator's residuary estate before division into shares, and in so far as it orders the costs of the application in the Court below to be paid out of the lapsed shares of residue; and in lieu declare that upon the true construction of the will and codicil, and in the events which have happened, the funeral and testamentary expenses and debts and the legacies bequeathed by the will and codicil of the testator, and the duty on any legacies bequeathed free of duty ought to be paid out of the testator's residuary estate before the division thereof into shares. And order that the costs of the plaintiff and of the defendants of the application in the Court below and of the appeal to this Court be taxed by the Taxing Master as between solicitor and client and be raised, retained and paid by the plaintiff and the defendant C. H. Kempthorne as executors of the said will and codicil out of the testator's residuary personal estate before the division thereof into shares.

Order varied.

Solicitors: *Holman, Fenwick & Willan, for Lean & Lean, Cardiff; Metcalfe, Sharpe & King, for H. P. Charles & Son, Neath; Metcalfe, Sharpe & King, for C. E. Edwards, Neath; Guscotte, Wadham, Tickell & Co., for Davies & Prichard, Cardiff.*

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LADIES' HOSIERY AND UNDERWEAR, LIMITED *v.* PARKER.

[1929. L. 698.]

Landlord and Tenant—Agreement for Lease for Years at weekly Rent—Holding over on Payment of same weekly Rent—Tenant holding over, whether a weekly or yearly Tenant.

By a lease of 1838, land at the rear of four houses, numbered 16, 18, 20 and 22, was leased for a term ending September 29, 1923, and by an underlease of 1906 was sub-let to J. till May 9, 1923. By an agreement of October 10, 1914, J. let it to P. for three years from October 12, 1914, at a rent of 2*l.* a week, payable weekly. On the land, and extending along the rear of Nos. 16, 18, and 20, was a shed, in which P. carried on the business of a general dealer until 1923, when he assigned the business to his wife and thereafter managed it for her. In 1919 the plaintiff company took an assignment of the land behind Nos. 16, 18, 20 and 22 for the rest of the term comprised in the lease of 1838, subject to the underlease of 1906. On July 8, 1920, the Midland Bank acquired the leasehold reversion immediately expectant on P.'s tenancy under the agreement of 1914: and on October 6 in the same year the plaintiff company acquired No. 18 and the land behind for fifty years from September 29, 1920, subject to the lease of 1838. After the end of his tenancy in 1917, P. had continued in possession of the land and the shed, paying rent first to J., and, after March, 1923, at J.'s direction, to the Midland Bank, which, in 1925, acquired the freehold reversion of the land at the rear of Nos. 20 and 22. No rent was paid by P. to the plaintiff company. There were negotiations at a later date for apportioning the rent between the bank and the plaintiff company which did not result in a concluded agreement. In September, 1928, the defendants entered into an agreement to purchase from the Bank the land at the rear of Nos. 20 and 22, and at the same time their solicitors wrote to the plaintiff company's solicitors asking if the company would grant them a lease of the land in the rear of No. 18. After some correspondence the plaintiff company refused to grant a lease of the land, and in April, 1929, commenced this action, claiming a declaration that it was entitled to the land, and alleging that the defendant P. was at most a weekly tenant:—

Held, by Maugham J., (i.) that mere continuance in possession by one originally in possession as tenant under a legal title, with the consent of the person who has become the landlord, may lead to the inference of a consensus that the one so continuing shall be a yearly tenant, but that on the facts a consensus that P. should become a yearly tenant of the plaintiff company could not be inferred.

(ii.) That the inference of a tenancy from year to year, which is drawn from the payment of rent by a tenant after the expiration of his tenancy, ought to be drawn only when such payments are by reference to a yearly rent, and that P.'s payments of 2*l.* a week rent to J. or the Midland

Bank, after the expiration of the term granted by the agreement of 1914, were not so paid.

Doe v. *Somerville* (1826) 6 B. & C. 126 and *O'Keeffe* v. *Walsh* (1880) 8 L. R. Ir. 184 followed.

R. v. *Inhabitants of Herstmonceaux* (1827) 7 B. & C. 551 distinguished.

Braythwayte v. *Hitchcock* (1842) 10 M. & W. 494 considered and applied.

Held, by the Court of Appeal, that on the facts there was no consensus between the plaintiff company and the defendants giving rise to the relation of landlord and tenant, without deciding the question whether, if there had been such a consensus, it would in law have created a yearly or a weekly tenancy.

ACTION.

By a lease of December 22, 1838, a piece of land at the rear of certain premises in King Street, Hammersmith, being Nos. 16, 18, 20 and 22, was demised to one Fergusson for a term ending on September 29, 1923. By an underlease of November 17, 1906, the said piece of land was demised to one Jenkins for a term ending May 9, 1923, at the yearly rent of 40*l.* On October 10, 1914, Jenkins, by a written agreement, agreed to let to Henry Alfred Parker—one of the defendants in this action—the whole of the land in the rear of Nos. 16, 18, 20 and 22 King Street, to hold for a term of three years from October 12, 1914, at a rent of 2*l.* a week, the first payment to be made on October 19, 1914, and subsequent payments weekly. There followed a covenant that " the tenant agrees to pay the rent as aforesaid, and to keep the premises in a clean and orderly state to the satisfaction of the landlord or his agent, and, at the determination of the said term or sooner determination, will deliver up to the landlord or his agent the premises in as good a state and condition as the same now are in (fair wear and tear and damage by accidental fire only excepted)," and there was a provision that the tenant should not make or allow to be made any alterations to the buildings upon the land without the written consent of the landlord, a restriction against his carrying on a number of trades, and a provision that he would use the premises " for the trade and business of a general dealer only." There followed a proviso that if the rent should be unpaid for seven days next after any day on which it should become due, the landlord could re-enter. The defendant

Henry Alfred Parker entered under that agreement, and became a tenant of Jenkins, subject to the payment of *2l.* a week.

The premises or buildings which were referred to in the agreement consisted of a shed, not of an elaborate character, extending over the land at the rear of Nos. 16, 18, and part of 20 King Street, but not over the land at the rear of No. 22.

On December 31, 1919, an assignment was executed by the then leaseholder to H. P. Newman & Co., who subsequently changed their name to Ladies' Hosiery and Underwear, Ld., and are hereinafter called "the plaintiff company," of all the land at the back of Nos. 16, 18, 20 and 22 King Street for the rest of the term of years comprised in the lease of December 22, 1838, but subject to and with the benefit of the underlease of November 17, 1906, to Jenkins, due to expire on May 9, 1923.

By an assignment dated July 8, 1920, the Midland Bank, Ld. (hereinafter called "the bank"), acquired the leasehold reversion immediately expectant on the tenancy, if any, of the defendant Henry Alfred Parker, under the agreement of October 10, 1914, of so much of the land as lay at the rear of Nos. 20 and 22 King Street, and, in June, 1925, became owner also of the freehold reversion immediately expectant thereon.

The defendant Henry Alfred Parker continued in possession of the premises at the rear of the four buildings in King Street after the end of his tenancy under the agreement of October 10, 1914. Early in 1923, Jenkins had written to Parker stating that he had transferred his interest to the bank as from March 25 of that year, and asking Parker thenceforth to pay all the rent which should become due either to the bank or to some one whom the bank should appoint to receive it.

On March 28, 1923, the bank served on the defendant Henry Alfred Parker notice to quit, and to deliver up before October 12 next following, the premises at the rear of Nos. 16, 18, 20 and 22 King Street, held by him, according to the wording of the notice "under the agreement of October 10, 1914."

By an assignment dated October 6, 1920, the plaintiff company acquired from one Scott, the owner of the reversion expectant on the lease of December 22, 1838, No. 18 King Street and the piece of land in the rear thereof, for fifty years from September 29, 1920, subject to the lease of December 22, 1838, so far as the same related thereto, at a substantial rent, the assignment including a covenant " not to underlet without the landlord's consent, such consent not to be unreasonably withheld."

The defendant Henry Alfred Parker or his wife continued after September 29, 1923, when the plaintiff company became entitled in law to the premises at the rear of No. 18 King Street, to pay the rent of 2*l.* a week payable for all the premises at the rear of Nos. 16, 18, 20 and 22; and the bank accepted the payments without any query.

In or about September, 1925, there was an interview between Mr. C. V. Levesley, the managing director of the plaintiff company, and the two defendants Henry Alfred Parker and his wife Helen Parker. Mrs. Parker was then carrying on the business of a general dealer and fruiterer on the premises on the land at the rear of Nos. 16, 18, 20 and 22 King Street, having taken over the business from her husband in the year 1923. Mr. Parker continued to manage the business. Mr. Levesley had some conversation with the defendants, but neither he nor they arrived at a clear understanding of the exact position between the defendants and the plaintiff company in regard to the premises at the back of No. 18 King Street. He was at that time unaware that the plaintiff company was the owner of the land at the back of No. 18. He knew that the bank was contemplating rebuilding operations; and the object of his visit to the neighbourhood had been to discover whether it was possible for the company to acquire a right of way down Bradmore Lane, an adjacent street.

The defendants, or one of them, were continuing to pay 2*l.* a week to the bank. In December, 1925, the plaintiff company, having recently ascertained that the premises at the back of No. 18 were its property, raised the question of the tenancy and occupation of the defendants. The company communicated on December 2, 1925, with the bank's architects, and the following correspondence ensued.

The first letter, dated April 14, 1926, was from Mr. E. Arthur Edmonds, the solicitor to the Midland Bank, to the solicitors for the plaintiff company, and was (omitting formal parts and signatures) as follows :—

"Referring to your letter of the 2nd of December last, addressed to Messrs. Whinney, Son, & Austen Hall, I have now had an opportunity of discussing the position with my clients, the Midland Bank, Ld., who are the freeholders of Nos. 20 and 22 King Street and the land at the rear thereof.

My clients instruct me that they had collected from one Parker certain sums of money a portion of which they are prepared to account for to the owners of the land at the rear of Nos. 16 and 18 King Street on satisfactory proof of their title.

It would appear that by an agreement dated the 10th of October, 1914, one Thomas George Jenkins let to Henry Alfred Parker all that piece or parcel of ground situate and being in the rear of No. 20 King Street and also in the rear of Nos. 16, 18, and 22 King Street for a term of three years from the 12th of October, 1914, at an inclusive rent of *2l.* per week. This agreement as you see expired long ago, and Parker has apparently continued in possession ever since on the same terms. As this agreement did not apportion this rental of *2l.* a week between the various pieces of land, it is obvious and necessary that an apportionment should be made, and with a view to getting the matter settled my clients have referred the question of apportionment to Messrs. Whinney Son & Austen Hall, who have advised them that the rent received from Parker should in their opinion be apportioned as follows :—

It appears that the total area occupied by Parker amounted until recently to approximately 2410 feet (*sic*) divided roughly as follows :—

Behind No. 22, 1088 feet; behind No. 20, 392 feet; behind Nos. 16 and 18, 930 feet.

It would also appear that the portion of land behind No. 22 is all frontage, and Messrs. Whinney are of opinion that the land behind No. 22 is roughly double the value of the remainder of the land, and they advise that the total rent from Parker should be allocated to each portion as follows :—

To No. 22, nine-fifteenths of the total;
No. 20, two-fifteenths of the total;
Nos. 16 and 18, four-fifteenths of the total.

In order to effect the apportionment it would appear to be necessary to bring in the owners of the land at the rear of No. 16, and I am endeavouring to get in touch with them, and, as a preliminary enquiry, I should be glad to know whether your clients who claim to be the owners of the land at the rear of No. 18 would be prepared to agree to an apportionment of two-fifteenths of the total rent of 2*l.* a week in respect of the land they claim to own.

With regard to the future, my clients instruct me that at the moment they have not decided what course they are going to adopt in relation to the land at the rear of Nos. 20 and 22, and they suggest that

1. An arrangement should be come to for the apportionment of the rent payable by Parker,
2. For the time being the whole rent should be collected by them, and the proper portions paid over from time to time to the owners of Nos. 16 and 18.

I understand that, in view of the building operations, Parker has for the last few weeks only been paying 6*s.* per week in respect of such of the premises as he had in occupation.

I shall be glad to hear from you in due course."

On April 21, 1926, Messrs. Blundell, Baker & Co., the solicitors to the plaintiff company, replied as follows :—

"We duly received your letter of the 14th inst., for which we are obliged.

We have consulted our clients, and they are prepared to accept the suggestion that they should accept an apportionment of the total rents in respect of the land equal to two-fifteenths.

Perhaps you will now let us have an account of the amounts apportionable.

We shall be glad to hear from you further, in due course, in regard to the future.

Our clients would naturally wish to be consulted in any suggested letting which includes any portion of their premises but for the moment, we imagine, no arrangements can be made until your client's building operations are completed."

On October 5, 1926, they again wrote :—

"Referring to our correspondence with you in April last, we have been expecting to receive an account of the rents apportionable in respect of the back rents, and also to hear further from you in regard to any future letting of the premises.

Will you please let us know how the matter stands."

On October 7 the solicitor to the Midland Bank replied :—

"I have to acknowledge receipt of your letter of the 5th instant. I have been in communication with the owners of No. 16 King Street, Hammersmith—the executors of A. E. Scott dcd.—and their solicitors, Messrs. Gamlen, Bowerman & Forward, inform me that their clients are the freeholders of Nos. 16 and 18 King Street, and also the land in the rear of both premises. No. 16, but not the land in the rear, is leased to a Mr. A. Churchman for a term expiring 29th September, 1897, and that (*sic*) No. 18 and the land in the rear is leased to your clients for a term expiring 29th September, 1970, and that their clients have given no licence to your clients to let the land in the rear to Parker, or to grant a way over it, but that they would be prepared to consider the question of granting a tenancy to Parker of the land in the rear of No. 16, also to grant a licence to the lessees of No. 18.

Before taking up the matter further with Messrs. Gamlen, I shall be glad to have your views, as I do not want to place your clients in an awkward position."

On October 28, 1926, the solicitors to the plaintiff company wrote :—

"We believe it is true that our clients never obtained any licence to the underletting of part of the land at the rear of

No. 18, because they never in fact underlet the same. When they took the lease under which they hold, the land at the rear was already then subject to a lease which has since expired. We shall be glad to hear what is proposed, and also with regard to the share of the back rent to which the plaintiffs are entitled."

On February 1, 1927, the solicitor to the bank further wrote:—

"I regret that I have not been able to deal with your letter of the 21st ultimo before, but unfortunately I have been laid up with the Flu.

I understand my clients have been making an endeavour to clear up the position with Parker to the 1st January, 1927, and as, at the present moment, I have not all the figures before me, I have written to my clients by this post for those figures.

I anticipate receiving them in course of a post or two, and I will ring you up and make an appointment to call and see you with regard to the matter."

On March 14, 1927, he wrote again as follows:—

"Referring to my letter to you of the 10th instant, I have not yet heard from Messrs. Gamlen, Bowerman & Forward, but in pursuance of my promise I beg to give you the following statement of the position to date.

By an agreement in writing dated the 10th October, 1914, Thomas George Jenkins agreed to let to Henry Alfred Parker

> All that piece or parcel of ground situate and being in the rear of No. 20 King Street, Hammersmith, and also in the rear of Nos. 16, 18, and 22 King Street aforesaid, and which said piece or parcel of ground had a frontage on and entrance to and from Bradmore Lane

for a term of three years from the 12th October, 1914, at the weekly rent of 2*l.* and in that agreement the landlord undertook to pay the head rent together with the rates and taxes imposed upon the said premises.

From the 24th March, 1923, the bank have been collecting from Parker a weekly rent of 2*l.* and allowing him from time to time deductions for general rates and property tax, being apparently under the impression that this rent related only to the land immediately at the rear of their premises Nos. 20 and 22 King Street.

In the period from the 24th March, 1923, to the 1st January, 1927, the bank have collected from Parker a total sum of 392*l*., and they have allowed Parker,

(*a*) In respect of the general rates up to the 30th September, 1926, the sum of 111*l*. 8*s*. 5*d*. Parker appears to be entitled to a further allowance of 21*l*. 6*s*., for general rates to the 31st March next.

(*b*) In respect of Property Tax up to the 5th October last, a sum of 34*l*. 2*s*. 6*d*. Parker will be entitled to a further allowance of 7*l*. 16*s*. in respect of the property tax up to the 5th April next.

Parker does not appear to have been allowed all the property tax to which he was entitled no allowances having been made by the bank for the following periods :—

1st instalment April to October, 1923.
1st and 2nd instalment, 1925 to 1926.

I am informed that Parker is aware that he has not been allowed certain deductions for Property Tax, but that he has lost the receipts and does not now propose to claim a return.

The bank therefore appeared to have received an amount of 246*l*. 9*s*. 1*d*. From this must be deducted the allowances of 21*l*. 6*s*. and 7*l*. 16*s*. before mentioned,—making a total net amount 217*l*. 7*s*.

With a view to arriving at some settlement of possible claims, the bank requested their surveyors, Messrs. Whinney, Son, & Austen Hall, to advise them thereon. These gentlemen suggested an apportionment as follows :—

To No. 22 King Street . . .	Nine-fifteenths.
To No. 20 ,, ,, . . .	Two-fifteenths.
To No. 16 ,, ,, . . .	Two-fifteenths.
To No. 18 ,, ,, . . .	Two-fifteenths.

I understand that your clients Messrs. H. P. Newman & Co. claim to be entitled as lessees of No. 18 King Street to some portion of the net rents received by the bank, but Messrs. Gamlen, Bowerman & Forward's clients claim to be freeholders of Nos. 16 and 18 King Street, and also entitled to some portion of the rents. Until I hear from Messrs. Gamlen, Bowerman & Forward what their views are, it is a little difficult for my clients to come to any settlement with your clients.

The proposal was made some time ago for all parties to join in a lease of the premises to Parker, but this has fallen through, the bank not being prepared to grant a lease.

I will keep in touch with the position, and unless I hear further from Messrs. Gamlen's in a few days, I will write them further."

On September 22, 1928, Messrs. L. O. Glenister & Son, the solicitors for the defendants, wrote to the solicitors for the plaintiff company :—

"Our client, Mrs. Helen Parker, has contracted to purchase from Midland Bank, Ld., their property in Bradmore Lane, Hammersmith, W. 6, which abuts on premises belonging to your client, Messrs. H. P. Newman & Co., Ld., at 18 King Street, Hammersmith, W. 6, of which she at present has the occupation under a tenancy from her vendor bank. It now becomes necessary for Mrs. Parker to make arrangements with your clients direct, and we shall be glad to hear from you on what terms your clients will be willing to let to her."

On October 18 the plaintiff company's solicitors replied :—

"With further reference to your letter of the 22nd September, we should be glad to have from you a plan showing the land which your client wishes to take from our clients Messrs. H. P. Newman & Co., and with her proposals in regard to rent. We may say at once that our clients would only consider the question of a tenancy for a short term, and subject to early termination, but before we can go into the question at all, we should like to know exactly what are the suggestions you have to put forward."

On November 22, 1928, the defendant's solicitors wrote to the plaintiff company's solicitors :—

"Please accept our apologies for not previously dealing with your letter of the 18th inst., completion of our client's purchase not yet having taken place.

We shall be obliged if you will let the matter stand over for a further period, and will communicate with you again with reference thereto in due course."

On February 20, 1929, the solicitors for the plaintiff company wrote to the defendant's solicitors :—

"With reference to our correspondence with you last year and Mr. Levesley's recent call on you, we have now received our client's instructions that they require possession of the whole of the premises at the rear of No. 18 and cannot consequently consider any question of a tenancy to Mrs. Parker.

Our clients were the owners of the ground lease of the premises which expired in 1923, and have never granted any tenancy to your client nor recognized her as a tenant. Your client is therefore a trespasser.

We shall be glad to hear that you will advise your client to abandon any occupation of our client's premises forthwith, or, if she claims to be tenant thereof, give us particulars of the lease or agreement under which she claims, and let us know if you will accept service of process on her behalf."

On March 14 the plaintiff company's solicitors wrote again as follows :—

"Referring to your inspection of the lease yesterday (this was an inspection, at their own request, by the defendant's solicitors of the plaintiff company's lease), our clients are very seriously inconvenienced by your client remaining in possession, as they wish to start building operations immediately.

Will you please let us hear from you forthwith that your client will go out of possession without further delay, otherwise we shall have to issue a writ without further notice."

To this the defendant's solicitors replied as follows on March 18, 1929 :—

"Referring to the previous correspondence and replying to your letter of 14th inst., our client is lawfully in possession of the above property, and we are certainly not prepared to advise her to vacate the same forthwith as your clients desire.

We are pursuing our enquiries and will let you hear from us with further reference to the matter in due course."

The plaintiff company issued its writ in this action on April 4, 1929, and the statement of claim claimed possession of the land at the rear of No. 18 King Street. By their defence, the defendants stated the agreement of October 12, 1914, alleging that at the end of the term therein comprised the defendant Henry Alfred Parker became a yearly tenant of the land at the back of Nos. 16, 18, 20 and 22 King Street. They claimed that rent had been paid to the bank as agents for the owners of (inter alia) the land at the rear of No. 18 King Street, and that the plaintiff company had agreed with the bank to accept its due proportion of the net rent, and was by reason of the interview between Levesley and the defendants of September, 1925, estopped from asserting either that the rent was not paid to the bank as its agent, or that the defendant Henry Alfred Parker had not a yearly tenancy: and they counterclaimed for a declaration that the defendant Henry Alfred Parker was a yearly tenant, under a tenancy determinable only by six months' notice expiring on October 12, in the year when the notice should be given.

Gavin Simonds K.C. and *F. R. Evershed* for the plaintiff company. The authorities on yearly tenancy are extremely difficult: see Foà, Landlord and Tenant, 4th ed., p. 394. In the circumstances of the present case the matter rests upon a consensus. Looking to the actions of the plaintiff company, it is impossible to infer that it meant to create any tenancy at all: *Richardson* v. *Langridge* (1); *Braythwayte* v. *Hitchcock*. (2) If a tenancy is a weekly tenancy, holding over cannot enlarge it: *Dougal* v. *McCarthy* (3); *R.* v. *Inhabitants of Herstmonceaux*. (4) There is nothing to show that holding over would in the present case create a tenancy from year to year. The plaintiff company came in by title paramount, there are no dealings of any kind with Parker until, in 1928, his solicitor writes, not asserting a tenancy, but asking upon what terms a tenancy will be granted. Parker said that he was paying rent to the bank on the plaintiff company's account, and he cannot, therefore, claim rights under his agreement with Jenkins.

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(1) (1811) 4 Taunt. 128.
(2) 10 M. & W. 494.
(3) [1893] 1 Q. B. 736.
(4) 7 B. & C. 551.

Lawrence Tooth for the defendants. The allusions in the authorities to a yearly rent, or to a rent referable to an aliquot part of a year, are intended to show what is in the contemplation of the parties: *Kelly* v. *Patterrson.* (1) It is for the owner who comes in by title paramount to inquire into the terms under which rent is paid by a tenant in possession. Otherwise he runs the risk of adopting the terms upon which the tenant is actually holding. But the defendants rely upon the fact that the plaintiff company was entitled in possession in May, 1923; no steps were taken for a long time, and the Court will infer a tacit agreement: see Redman, Landlord and Tenant, 8th ed., pp. 10, 11; *Doe* v. *Somerville* (2); *Cairncross* v. *Lorimer* (3); *Croft* v. *William F. Blay, Ld.* (4) The defendants claim to be yearly tenants. It is admitted that a person coming in by title paramount, and finding a sitting tenant holding over, is not bound by any stipulation by virtue of which that sitting tenant claims to be holding over: *Oakley* v. *Monck.* (5) If the defendants were now in possession by virtue of any special stipulation, the Court would have to be satisfied that the plaintiff company knew of it. As from 1917, Parker became a yearly tenant of Jenkins: the periodical payment reserved under the tenancy agreement was 2*l.* a week; and, from and after the end of the tenancy agreement—nothing being said, and the same rent being paid—the tenancy is from year to year: *Right* v. *Darby.* (6) Further, there was a definite arrangement between the parties.

Gavin Simonds K.C. in reply. The ultimate question is whether, upon all the facts of the case, a jury ought to infer that there was an agreement between the parties, or a

(1) (1874) L. R. 9 C. P. 681, 684.
(2) 6 B. & C. 126.
(3) (1860) 3 Macq. H. L. 827, 829.
(4) [1919] 2 Ch. 343, 349.
(5) (1866) L.R. 1 Ex. 159, 166.
(6) (1786) 1 T. R. 159, 163.

recognition by the plaintiff company of the defendant Parker as its tenant, upon terms which included a yearly tenancy. As between the plaintiff company and the bank, there was nothing to constitute the bank its agent. From 1923 onwards, nothing happened which would have debarred Parker from alleging that he held adversely to the plaintiff company. That is really conclusive. The whole foundation of the implication of a tenancy from holding over rests upon payment of rent or an agreement to pay it, and here there was neither. In *O'Keeffe* v. *Walsh* (1) there was a presumption that an old agreement was being adopted. But that cannot be presumed here, because the old agreement was silent as to the parcel in the occupation of which the tenant has remained. No case has been cited establishing that the receipt of rent has created a yearly tenancy, except where that rent has been a yearly rent or by reference to a year. The principle is that a tenancy from year to year is founded upon payment and receipt of a rent which is referable to a yearly rent. In the present case, there is no basis upon which to infer anything but a weekly tenancy, arising out of payment of rent every week : *Cole* v. *Kelly*. (2) Where there is a demise from week to week and nothing more, a tenant, whether holding over or not, certainly cannot have anything more than a yearly tenancy. There is no authority for suggesting that, where there is a holding over, the length of the original term may create a yearly tenancy.

MAUGHAM J. This is a case of some importance and not a little difficulty. If it were not for the fact that it is exceedingly desirable that all the parties should know where they stand upon my judgment at the earliest possible date, I should have been tempted to put my remarks in writing. But, having regard to the desirability of clearing up the position without delay, I will state now the decision at which I have arrived. I must first state the facts in some detail. [His Lordship then stated the facts, and continued :] It may be observed that the notice to quit of March 28, 1923,

(1) 8 L. R. Ir. 184.

(2) [1920] 2 K. B. 106.

was in some respects wrong, inasmuch as the bank had acquired only the property in the rear of Nos. 20 and 22 King Street, though it appears possible that it may also have acquired the interest of Jenkins at some date or dates between March 25 and May 9, 1923—a period of about six weeks. That, however, has not been established before me. I pause here to say that the notice seems to me, as at present advised, wholly inoperative in regard to the premises at the rear of No. 18 King Street. I do not think that a notice to quit premises, to be complied with at a date long after the person giving the notice has ceased to have any interest in the premises, can have any operation.

It will be observed that, under the agreement of October 6, 1920, the plaintiff company became entitled to the premises in King Street known as No. 18, and—as from September 29, 1923—was entitled also to the premises in the rear of No. 18. The position was a little curious, because the premises at No. 18 were so constructed that there was no way to the premises at the back at all. There seems to have been a kind of wall at the back of the front premises : and the plaintiff company seems to have forgotten, shortly after October, 1920, that it had any right to the premises at the back.

The defendant Henry Alfred Parker continued, after September 29, 1923, when the plaintiff company became in law entitled to the premises at the back of No. 18, to pay the rent for all the premises at the back of the four houses in King Street to the bank. The bank began rightly to receive the *2l.* a week, because, for a short period—having acquired the interest of Jenkins—it was entitled to it. Its right to it came to an end when Jenkins' tenancy of the premises at the back of No. 18 came to an end.

In September, 1925, or thereabouts, there was an interview between Mr. C. V. Levesley, the plaintiff company's managing director, who has given evidence in this case, and the two defendants : and I think that I ought now to state shortly the evidence as to the effect of that interview, since it is relied upon by the defence as an estoppel.

I will take the defendant's story first. The defendant Henry Alfred Parker says that Mr. Levesley came to see them. He did not know who Mr. Levesley was. Mr. Levesley stated that he wanted to look over the premises at the back of the plaintiff company's premises. Mr. Parker was quite willing to show him, and took him over. Mr. Parker says that he was asked by Mr. Levesley to whom he was paying the rent, and that, in reply, he told him that he was paying 2*l*. a week, and that he paid it to the Midland Bank. Mr. Levesley then asked for the manager's name and, saying that he would go to see him, went away and returned in a few minutes. The defendant Mrs. Parker was present at the time, and it is alleged that Mr. Levesley said: "Everything is all right, you can carry on." Mr. Parker further said that eighteen months later he again saw Mr. Levesley, who again went to see the back of the premises. The Parkers were still paying the rent to the bank: but on this second visit by Mr. Levesley nothing was said about the rent. Mr. Parker admitted that on the occasion of the first visit, Mr. Levesley did not leave him with the impression that the land at the back belonged to the plaintiff company, and did not tell him who he was: nor did he, Mr. Parker, know that the 2*l*. a week had anything at all to do with the plaintiff company, or that Mr. Levesley came from the plaintiff company or on its behalf. On the occasion of Mr. Levesley's second visit in 1927, the evidence of the Parkers is that in substance all that happened was that Mr. Levesley went to see the premises at the back and made no observation relevant to the present case. Mrs. Parker corroborates her husband, in particular in his evidence as to the statement: "It is all right, carry on." Mr. Levesley, on the other hand, gave evidence of a different character. I think that it is manifest from his evidence, and from the corroboration which has been given by his solicitor, as to how the facts with regard to the title to the property at the rear of No. 18 were ascertained, that Mr. Levesley, when he paid his first visit in or about September, 1925, was quite ignorant of the fact that the property at the back of No. 18 belonged to the plaintiff company as leaseholder.

He knew that the bank was contemplating rebuilding, and had served a party wall notice, a sufficient reason for the plaintiff company's managing director to go down and inspect the premises: and I have no doubt at all, from the evidence of Mr. Levesley and of his solicitor, that his object in going down then was partly to consider the matter of the party wall notice and partly to find out whether it was possible for the plaintiff company to obtain a right of way extending from the front premises to Bradmore Lane, which runs down on the west side of the four houses in King Street. That might very easily be done at the time when the bank was rebuilding, and would be of great assistance to the plaintiff company. Mr. Levesley wholly denies that he made any such statement as "It is all right, carry on," and I would observe that, even if he had made such a statement, it could not have been with reference to the payment of rent to the bank, because it is perfectly clear that, at that time, he did not know that the premises at the back belonged to the plaintiff company and that, therefore, some part of the rent which was being paid by the defendants, or one of them, was being paid in respect of the whole of the land at the back of the four premises, and, therefore, ought in substance to be apportioned and some part of it paid to the plaintiff company. He was unaware of it. I think, on the whole, that it is unlikely that he used such an expression, in the circumstances, as "It is all right, carry on," and I cannot possibly hold that at that interview he expressly or impliedly authorized the defendants to continue paying to the bank the rent due to the plaintiff company.

I should add, with reference to the business of the defendants, that it seems that the business of a general dealer or fruiterer, which used to be carried on by the defendant Alfred Parker, about six years ago, i.e., in about the year 1923, became the property of Mrs. Parker, and still is her property: and it is admitted that Mrs. Parker has taken an assignment of the premises at the back of No. 16 King Street.

While the defendants (or one of them) were continuing to pay the rent of *2l.* a week to the bank—namely, in

December, 1925, the plaintiff company raised the question of the defendant's rights, having then recently ascertained that the premises at the back of No. 18 were its property. On December 2, 1925, the plaintiff company's solicitors communicated with Messrs. Whinney, Son, & Hall, the bank's architects, and a correspondence followed. [His Lordship read the letters set out above, and continued :] It is quite clear, I think, that, up to that date (i.e., March 14, 1927), there has been no final agreement for apportionment.

I ought to say here that the question of the defendants' tenancy is in no way affected by the fact that, when the plaintiff company required possession of the land and urgently asked for it, there was plenty of time to give six months' notice, determinable on October 12 of this year; but it must be observed that the defendants by their solicitors did not set up at that time any yearly tenancy resulting from a holding over of the agreement of 1914, and accordingly, the plaintiff company, not knowing that any title was being set up, treated the defendants either as trespassers or as tenants on sufferance or as tenants at will, and issued their writ without giving them any formal notice.

I now come to consider the points raised on behalf of the defendants, and the first thing that I wish to mention is this. Upon the evidence, I must come to the conclusion that no rent was ever paid by the defendants or either of them to the plaintiff company direct in respect of the land at the back of No. 18; secondly, as I have already intimated, I think that there never was an agreement for the apportionment of the 2*l.* paid by the defendants or one of them, in respect of the land at the back of the four premises in King Street. I have already read or referred to the letters, and I think that they leave the matter in this way, that, although the plaintiff company was not unwilling to have an apportionment, there was never any definite agreement. In fact, in one of the final letters, the bank's solicitor is still in doubt whether the plaintiff company's title is such that the rent can properly be apportioned, or any part of the rents already collected be paid to the plaintiff

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company. I will observe that, even if there was an apportionment with the consent of the bank, it was not an apportionment binding the defendants or either of them. Since there was no apportionment, in my opinion it follows that there was never any ratification of an alleged agency of the bank, treated as agent to receive rent on behalf of the plaintiff company. It is true that the bank, after it knew most, if not all, of the facts, continued to receive rent—namely, 2*l.* a week. It is also true that the plaintiff company never objected to that course; but in my view that does not establish an agency; and I do not see how there could be such an agency by subsequent ratification, unless it had first been determined how much was to be deemed to have been received by the bank on behalf of the plaintiff company. I think that these matters were left in a state of negotiation.

Accordingly, that part of the defence fails, and there comes the question of estoppel based on the interview of September, 1925. I have already given my reasons for thinking that that defence fails upon the facts. Nothing that Mr. Levesley said at that time could have justified the defendants or one of them in thinking that they were authorized to continue paying to the bank the rent in respect of the premises at the back of No. 18; nor, in my judgment, did he ever give such an authorization.

There remains the question whether, in all the circumstances of the case, having regard to the acquiescence by the plaintiff company in the continuance in possession of the defendants, there is to be inferred an agreement or a consensus creating the relationship of landlord and tenant between the plaintiff company and the defendants, or one of them, on the terms of the agreement of October 10, 1914, so far as those terms are applicable to a tenancy at will. That, in my view, is the substantial point in this case. I have already said that no rent has been, in my opinion, accepted either by the plaintiff company or by any agent on its behalf. On the other hand, it is true that there are strong authorities showing that, from a mere continuance in possession by one who originally took possession as tenant under a legal title, with the consent of the person who has become the landlord, an inference may be drawn of a consensus between the landlord and the tenant, that the tenant shall hold as a tenant from year to year.

The first case to which I think I need refer is *Doe* v. *Somerville.* (1) In that case, a rector had demised the rectory and the glebe lands to a trustee for securing an annuity for a term of years "if he"—the rector—"should so long live." That had been done in December, 1816, the previous incumbent having died in April, 1816. Two persons were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, the date of the conveyance by the rector to the trustee. Their title, as a title as tenants under the first rector, had come to an end with his death in April, 1816. The occupiers or late tenants remained in possession, therefore, for eight months in one case and nine months in another case, between the date of the promotion of the new rector, and the grant of the annuity, and they had not been disturbed. It was held by Abbott C.J., who delivered the judgment of the Court, that after such a lapse of time the new rector must be presumed to have assented to the continuance of the tenancy of the late tenants under the same terms as before, and that he could not have dispossessed them without a notice to quit, and that, if he could not, neither could any person claiming under him. I confess that I have some little doubt whether the reporter has there informed us as to all the facts which justified the conclusion to which the Court came. However, the case has been frequently followed.

I will not go through all the authorities where that case has been mentioned and, apparently, assented to; but in *O'Keeffe* v. *Walsh* (2) the Court of Appeal in Ireland—consisting of Lord O'Hagan C., Morris C.J., and Deasy and FitzGibbon L.JJ.—had occasion most carefully to consider the whole of the authorities dealing with *Doe* v. *Somerville* (1), and deliberately came to the conclusion

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(1) 6 B. & C. 126.

(2) 8 L. R. Ir. 184, 188, 193.

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that the case—which the Court below had dissented from —must be taken to be good law, and they determined to follow it. "That case," said Lord O'Hagan, "was so decided fifty-four years ago . . . . by some of the most eminent judges who have ever sat on the Bench of England; and I am not aware that it has ever since been overruled, or seriously called in question." The fifty-four years have now grown to something over a hundred, and I cannot find that any one has ever doubted it. FitzGibbon L.J., a very eminent judge, says, with regard to the case before him: "Now, if there was a contract at all, the presumption is that it was on the terms of the old tenancy—that is, that the defendant offered to hold on as a continuing tenant, and that the plaintiff accepted him as such. The terms of the old tenancy are proved to have been known to the plaintiff; and there being an old tenancy by which to regulate the terms in detail, the matter is reduced to the question whether there was any evidence from which it could be reasonably inferred that there was a consensus between the plaintiff and defendant to their adopting the relation of landlord and tenant. The plaintiff knew that the defendant was continuing to occupy the land. What but a tenant could the defendant reasonably consider himself to be while, with the plaintiff's knowledge, he continued to occupy?" And, accordingly, he held—and all the judges held in that case, overruling the Court below —that, consistently with the decision in *Doe* v. *Somerville* (1), they must come to the conclusion that the continuance in possession of the late tenant, without any objection by the new landlord, who entered upon the death of the preceding tenant for life, must lead to the inference that there was a consensus between the plaintiff and the defendant to their adopting the relation of landlord and tenant on the terms of the old tenancy.

The question, therefore, to be determined on this part of this case is one of fact. There are a number of circumstances to be borne in mind in considering the question. In the first place, I think that it is relevant to observe that only

(1) 6 B. & C. 126.

a comparatively small portion of the premises comprised in this agreement of October 10, 1914, is the subject of the suggested tenancy, and to note that a tenancy from year to year of the premises at the rear of No. 18 would be one to which the terms of that agreement could hardly apply. The rent, first of all, has to be apportioned, and then the tenant would be quite unable "to deliver up the premises in as good a state and condition" as the same were in 1914, if alterations of premises on other parts of the back land are made either by the tenant or by some third party; in other words, so far as buildings are concerned, the suggested tenancy would be one of a curious slice of a shed, without walls on either side.

In the second place, I think that it is not immaterial to note that the agreement of October 10, 1914, is what may be described as a stale agreement, because the tenancy had come to an end, according to its terms, in the year 1917—no less than eight years before the events which are alleged to have resulted in the consensus which the defendant has to establish; and it is important, I think, to observe that, in the early part of the period that elapsed after the plaintiff company became entitled to this part of the property, the plaintiff company was quite ignorant of the terms of the agreement of October 10, 1914, and, indeed, did not know that it existed; in other words, it is not quite like a case where, on the death of a tenant for life or a rector, the new landlord comes into possession knowing that there are tenants with whom his predecessor has made agreements, although he may not know the terms of them.

Thirdly, I do not think that it is irrelevant to remark, even on this part of the case, that the rent is rent payable weekly: and I think that, in ignorance of the terms of the agreement, somebody who knew that there was a weekly rent payable by somebody alleged to be a tenant, would naturally come to the conclusion that, in all probability, the tenancy was one of a weekly character, so that the occupation of the premises could be put an end to by a week's notice.

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Fourthly, I think that it must be borne in mind that neither the plaintiff company nor the defendants or either of them conceived that they had entered into an agreement as a result of which there was an existing tenancy from year to year. That appears, I think, from the letter from Messrs. L. O. Glenister & Son, of September 22, 1928—to which I have already referred—and from the answer of October 18, from Messrs. Blundell, Baker & Co.

Next, I think that it is material to note that there was a covenant against underletting contained in the lease of October 6, 1920, to the plaintiff company. It is true that the landlord's consent was not to be unreasonably withheld, but I think that, in considering whether there has been an agreement or consensus such as I have mentioned, it is not immaterial—though I do not place too much stress upon it—to observe that the plaintiff company, if such an agreement had been suggested in terms, might well have remembered that its proper course was to obtain the landlord's consent, and that, if it acted in the absence of that consent, it might well be exposed to considerable difficulties with regard to its landlord.

Finally, I think that it is necessary to bear in mind that, although the present suggested tenant is the defendant Henry Alfred Parker, in or about the year 1923, he disposed of his interest in the business, according to his own evidence, in favour of his wife: and it seems to be a little difficult to see how it can be suggested that the subsequent conversation, or the events that have occurred as between the plaintiff company and the defendants since 1923, have resulted in a tenancy's being effected under which the defendant Henry Alfred Parker is the tenant. I think that the history as I have narrated it, coupled with the fact that Mrs. Parker became the owner of the business, would rather tend to establish that, if there had been a tenancy granted to anybody, it would be a tenancy granted to the owner of the business, Mrs. Parker. The question, then, if that were alleged, would be: "When did she become the tenant?" Mrs. Parker has never held over under the agreement of October 10, 1914;

and she, as it seems to me, could assert, if the assertion was of any use to her, that, since the year 1923, she has been occupying the premises in the rear of No. 18 under a title adverse to the plaintiff company, an occupation which, if it continued for twelve years, would entitle her, under the statute, to continue to hold the property as against the plaintiff company.

I have endeavoured to summarize, as briefly as I can, the circumstances which I think have to be borne in mind in favour of the plaintiff company on this part of the case.

In favour of the defendants, or such one of them as is alleged to be the tenant—namely, Henry Alfred Parker, it is to be borne in mind that for between two and three years (since December, 1925) the defendants, or one of them, had been allowed to continue in possession, paying a rent to the bank, in respect of the four properties in the rear of the four houses in King Street, and this without any objection or warning on the part of the plaintiff company. I have to perform the functions of a jury, and to come to a conclusion, on the balance of those considerations, as to whether I should infer that there has been a consensus between the plaintiff company and the defendant Henry Alfred Parker under which that defendant has become a tenant from year to year of the plaintiff company. I have come to the conclusion that I ought to decide that question in favour of the plaintiff company.

That is sufficient to decide the case. But since this case may go further, there is another point with which I ought to deal. The question is whether the holding over under an agreement in the terms of that of October 10, 1914, with the continuance of the payment of the weekly rent of 2*l*., would create the relationship of landlord and tenant on the terms of a yearly tenancy. The agreement was to let the premises for the term of three years commencing from October 12, 1914, at a weekly rent of 2*l*. to be paid every week, and with a right of re-entry on failure to pay the rent for seven days. It is well known, I think, that " tenancy from year to year " is a tenancy which originally used to be described as a tenancy

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at will, with a provision that not less than six months' notice had to be given to put an end to it, expiring at the time of the year at which the original tenancy expired. The authorities on that point are referred to in Redman's Law of Landlord and Tenant, 8th ed., pp. 4, 5. At the end of each year, if not determined by proper notice, another year is added to the term. The inference that that is the intention of the parties is an inference drawn from the fact that, in the ordinary case, the payment of rent is by reference to a yearly rent. It is true that the rent may be paid each year, or half-yearly or quarterly, or even weekly; but in those cases, at any rate so far as the authorities are concerned, the rent is always a payment by reference to a year's rent.

There is an old case of *R.* v. *Inhabitants of Herstmonceaux* (1), where the question arose in a case of settlement. The tenancy there was a tenancy under which the pauper agreed with a Mr. Foster to take a house at twenty guineas a year, the rent to be paid weekly, and the question was argued, under the construction of the relevant statute—6 Geo. 4, c. 57—whether that was a yearly tenancy or not. The proviso for determining the tenancy in the middle of the year, which existed in that case, was immaterial. The decision turned upon the view of the Court that a taking at an annual rent, though the rent is to be paid weekly, is prima facie a yearly tenancy. That was stated by Bayley J. delivering the judgment of the Court.

In the present case, the lease or agreement is one for three years at a rent of 2*l*. a week. It is not a lease for three years at a rent of 104*l*. per annum payable weekly: and it is observable that 2*l*. a week is a rent which, as we all know, is not exactly divisible into the number of days either of an ordinary year or of a leap year. I cannot find, and counsel have been unable to find, any case exactly in point; but I have come to the conclusion that there is no reason for extending the views, which are binding on me, as to the terms which justify the inference that a tenancy is from year to year, and that in this case, narrow as the distinction is, the holding over of the premises after the expiration of the agreement of October 10, 1914, would have resulted only, and did result only, in the tenant's being a tenant from week to week.

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(1) 7 B. & C. 551.

In coming to that conclusion I derive support from the judgment of Parke B. in *Braythwayte* v. *Hitchcock*. (1) He says: "Although the law is clearly settled, that where there has been an agreement for a lease and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson* v. *Langridge* (2), a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only." My conclusion, therefore, is that when the defendant Henry Alfred Parker, after the expiration of that agreement, paid the sum of 2*l.* a week to his landlord Jenkins, he was prima facie not paying it with reference to a year or an aliquot part of a year, but was paying it with reference to the week in respect of which he made the payment.

In the result the plaintiff company will have a judgment for possession of the premises at the back of No. 18, and the defendants must pay the costs of the action.

K. R. A. H.

C. A.

The defendants appealed. The appeal was heard on January 14, 15, 1930.

Lawrence Tooth and *R. Fraser Roberts* for the appellants.

Gavin Simonds K.C. and *F. R. Evershed* for the respondents were not called upon.

The Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.) dismissed the appeal on a ground not calling for full report—namely, that on the facts there was no consensus creating the relation of landlord and tenant

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(1) 10 M. & W. 494, 497.

(2) 4 Taunt. 128.

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between the parties, and without deciding the question whether, if there had been such a consensus, a yearly or a weekly tenancy would in law have been created.

Appeal dismissed.

Solicitors for plaintiffs: *Blundell, Baker & Co.*
Solicitors for defendants: *L. O. Glenister & Son.*

H. C. G.

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CHAMPAGNE HEIDSIECK ET CIE MONOPOLE SOCIETE ANONYME *v.* BUXTON.

[1928. C. 1055.]

Trade Mark—Infringement—Passing Off—Legal Effect of Registration—Badge of Origin—No Badge of Right to Control Dealings with Goods—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 3—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 39.

The statutory right now conferred on the registered proprietor of a trade mark by s. 39 of the Trade Marks Act, 1905, is the same as that which was conferred by s. 3 of Trade Marks Registration Act, 1875—namely, the right to use the mark as a trade mark to indicate that the goods upon which it is placed are his goods and to exclude others from selling under the mark goods which are not the goods of the registered proprietor. This right does not carry with it any right to control, by the imposition of conditions or restrictions, the selling or dealing with the goods under his mark by other persons.

The plaintiffs produced champagne in France. They sold "Champagne Dry Monopole" in England and France, the wine sold in France being the sweeter of the two. The labels on the bottles containing the wine sold in France bore the word "Brut" and sufficiently distinguished in England (as the Court found as a fact) that wine from the wine prepared for and sold in the English market. The plaintiffs, who were the registered owners of trade marks under which the wine prepared for English use was sold, took certain steps to prevent the Brut wine from being sold in England. The defendant, without being a party to any breach of contract, imported the plaintiffs' Brut wine into England, and sold it there in bottles bearing the same labels which the plaintiffs themselves used on the bottles containing that type of wine.

In an action for an injunction to restrain the infringement of the plaintiffs' trade marks by the sale of the Brut wine in England and from passing off that type of the plaintiffs' wine as and for the plaintiffs' wine prepared for the English market:—

Held, first, that the defendant by the sale of the Brut wine in England, although prohibited by the plaintiffs, under the very marks which the plaintiffs themselves adopted to distinguish that type of their wine, were not guilty of passing off the Brut wine as and for the plaintiffs' type of wine prepared for the English market; and, secondly, that the defendant was in no wise affected by the restrictions sought to be imposed by the plaintiffs against selling or dealing with the Brut wine in England. The action was, accordingly, dismissed.

Witness Action.

The plaintiffs were producers of champagne in France. They prepared a special type of that wine with a view to its sale on the English market, and another type of a sweeter quality than the last mentioned type, but not so sweet as several types which they produced for various continental markets. That sweeter type of wine (hereinafter referred to as the "Brut wine") was destined by the plaintiffs for the French market; and, for reasons which it is not material to state, the plaintiffs desired that it should not be sold in England and put certain obstacles in the way to prevent their selling agents from importing it into England. But despite those obstacles, some of the Brut wine with the label and "get-up" with which the plaintiffs sold their Brut wine did in fact—by means which in the opinion of Clauson J. it was not material precisely to determine—reach the hands of the defendant in England, without, so far as it appeared from the evidence, the defendant committing or being a party to any breach of contract.

Both types of the wine were contained in bottles bearing labels describing the wine as "Champagne Dry Monopole," but between the respective labels there were the following distinctions: The bottles containing the type of wine prepared for English consumption bore a second label or necklet with the words, "Reserved for England," the label on the bottles containing the Brut wine bore the words, "Maison Fondée en 1785," instead of "Established 1785," which appeared on the label on the bottles containing the English type, and had not the words "Registered Trade Mark," which the labels for the English type bore; but the labels on the bottles containing the Brut wine bore the word "Brut" which for many years appeared in black letters in the bottom right-hand corner, but which, during a comparatively recent period, in order to emphasize that the wine for French consumption was the Brut variety of Dry Monopole champagne, was placed in red writing across the label. Apart from those distinguishing features, the general design and "get-up" of the labels in both instances were very nearly the same.

The plaintiffs were the registered proprietors of (amongst other marks) the trade mark No. 449,612, which consisted of the lettering and design which appeared on the labels affixed to the bottles containing the type of wine prepared for English consumption.

In their statement of claim the plaintiffs alleged that the defendant, although well aware, at all material times, of the custom of the plaintiffs to sell their Brut wine subject to a condition that it should not be resold within the British Isles, nevertheless imported that wine into England and threatened to sell it there under a label being a colourable imitation of the plaintiffs' trade mark, in the form of the label used on their Brut wine bottles and that thereby the defendant infringed the plaintiffs' rights in their registered trade mark. They alleged that such sales as the defendant threatened were calculated to deceive the public to the damage of the plaintiffs' trade reputation; and they claimed an injunction to restrain the defendant from infringing their registered trade mark by the use of those labels and from passing off as and for the wine sold in England by the plaintiffs under the brand "Champagne Dry Monopole" other wine by means of the use of labels got up in imitation of the appropriate labels of the plaintiffs and they claimed also an inquiry as to damages.

The defendant admitted the sale by him in England of Brut wine of the plaintiffs' manufacture and in bottles with the labels which the plaintiffs themselves adopted for the purpose of selling their Brut wine. He denied that such sale was calculated to deceive the public. He alleged that Brut wine so labelled had been sold in England for several years past as the plaintiffs well knew, and further that, if any deception was calculated to arise, it was due to the conduct of the plaintiffs themselves in omitting to distinguish sufficiently between their two separate types of wine.

The managing director of the plaintiff company was called as a witness and identified one of the bottles with the labels and get-up indicating that it contained the English type of champagne, which bottle was exhibited as P. 1, and he identified one of the bottles with the label and get-up indicating that it contained the French or Brut type of champagne, which was exhibited as P. 3.

The agent employed by the plaintiffs in France for the sale of their Brut wine in France and Corsica gave evidence to prove that he was bound by his contract of employment with the plaintiffs not to export the Brut wine, and that the plaintiffs had for several years been aware that, in spite of those restrictions, the Brut wine was being sold in England. He also said that he sometimes purchased Brut wine on his own account and sold some of it to a purchaser at Marseilles. Several witnesses also were called, who gave evidence to prove that anyone who ordered in this country Heidsieck's Dry Monopole Champagne would not be deceived by the label on the bottle containing the Brut type of champagne.

Sir Duncan Kerly K.C., *Moritz K.C.* and *G. H. Lloyd Jacob* for the plaintiffs. The plaintiffs do not complain, nor could they, of the defendant selling their wine under their own trade mark. What they do complain of is the sale by the defendant of the plaintiffs' wine of a certain type under the plaintiffs' trade mark in such a way as to lead a purchaser to think he was getting wine of a certain type whereas the wine he was actually getting was of a different type: *Jameson (John) & Son, Ld.* v. *Clarke* (1); *Teacher* v. *Levy* (2); *Hunt, Roope, Teage & Co.* v. *Ehrmann Bros.* (3) Those were all cases of passing off, but the same rule is applicable to the case of the infringement of a trade mark. Under s. 39 of the Trade Marks Act, 1905, the plaintiffs' right under their registered trade marks is the exclusive right to use those marks in connection with the goods in respect of which they are registered; and under

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(1) (1902) 19 R. P. C. 255.
(2) (1905) 23 R. P. C. 117.
(3) (1910) 27 R. P. C. 512.

s. 38 they may assign their marks. The plaintiffs therefore have under that section a monopoly in the wine they sell in England under their trade marks. The defendant has infringed those trade marks by selling in England a type of wine, the sale of which in England is prohibited by the plaintiffs, under a label which is a colourable imitation of the label under which the plaintiffs' type of wine prepared for English consumption is sold by them in England. There is no authority precisely in point, but the matter discussed in *Dunlop Rubber Co.* v. *A. A. Booth & Co.* (1) bears some analogy to the matter in question here. In that case French Dunlop tyres were imported into this country and sold here under a trade mark identical with the English trade mark owned by the plaintiffs and it was held there had been an infringement of the English trade marks. The plaintiffs have done their best to stop the importation into England of the Brut wine, and have in fact in several instances taken legal proceedings to prevent infringement of their mark: see (inter alia) *Champagne Heidsieck et Cie* v. *Scotto* (2), and never acquiesced in the importation of the Brut wine into England. The evidence is that the defendant must have known that the plaintiffs insisted upon the condition that the Brut wine should not be sold in England.

The sale of the plaintiffs' Brut wine in England, although in bottles bearing the plaintiffs' own labels, if liable to mislead the unwary, cannot be justified by showing that a customer in England who carefully examines the label would not be misled: *Singer Manufacturing Co.* v. *Loog.* (3) An ordinary British customer here would be apt to confuse the two marks.

[Clauson J. referred to *Farina* v. *Silverlock.* (4) After the Acts of 1875 and 1905 introducing the registration of trade marks, the registered proprietor of a trade mark had the same rights which a man had who before the Acts acquired the use of a trade mark to distinguish his goods: the Acts conferred no new rights.]

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(1) (1926) 43 R. P. C. 139.
(2) (1926) 43 R. P. C. 101.
(3) (1882) 8 App. Cas. 15, 18.
(4) (1856) 6 D. M. & G. 214, 217.

The defendant, by selling the Brut wine under the plaintiffs' trade mark, was prima facie using the mark which belonged to the plaintiffs, and the defendant was using that mark on goods produced by the plaintiffs of a certain type, so as to mislead the public into the belief that those goods were the goods produced by the plaintiffs of another type, which he was not entitled to do. Sect. 39 of the Act of 1905 vests in the registered proprietor of the mark the exclusive right to the use of that mark or, in other words, a monopoly. The rights conferred by that section are more extensive than the old rights described in *Farina* v. *Silverlock.* (1) The defendant is "using" the plaintiffs' mark when he sells the Brut wine, and it is submitted that the sale of the Brut wine by the defendant was an infringement of the plaintiffs' trade mark if made without the licence or consent, either express or implied, of the plaintiffs: see Sebastian, Trade Mark Registration, 1905–1919, 2nd ed., pp. 11, 12. In the present case the licence to sell the Brut wine was restricted by the plaintiffs, who took steps to prevent the importation of that type of their wine into England of which the defendant must have been fully aware.

Sir Arthur Colefax K.C. and *Trevor Watson* for the defendant.

There is no evidence that the Brut wine, when sold in this country under the plaintiffs' labels, misled or was calculated to mislead the public into believing that they were getting the English type of wine when they were supplied with the Brut type. The defendant acquired the Brut wine through the trade, and it was invoiced for what it actually was, and he sold it as the plaintiffs' Brut wine. The possibility of deception was entirely due to the plaintiffs' own action. A condition cannot be attached to a contract for the sale of goods, so as to make it run with the goods. The law was not materially altered by the Trade Marks Registration Act, 1875, s. 3, or by the Act of 1905, s. 39. No new rights were added by those statutes. The right conferred by those statutes was the same as the old rights which a trader had to use his mark in connection with his goods to indicate that the goods were his goods. The use of a mark is to identify the goods as those of the proprietor of the mark. The defendant did no more than sell the Brut wine under the very mark which the plaintiffs themselves selected to identify that type of wine as their wine. It is not practicable for the proprietor of a trade mark, except by contract, to impose restrictions upon the right of another to sell his (the proprietor's) goods under his mark. That right does not depend upon consent to the user on the part of the proprietor of the mark. There is no authority for the suggestion made in Mr. Sebastian's work, which has been referred to, at pp. 11 and 12. The true test still is that which was laid down by Lord Cranworth in *Farina* v. *Silverlock* (1), has the mark been placed on the plaintiffs' goods ? If yea, there is no passing off.

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(1) 6 D. M. & G. 214, 217.

Cur. adv. vult.

Nov. 8. Clauson J. [after stating the facts as above set forth, proceeded as follows :] The plaintiffs put their case in two ways. First they say that the defendant selling the bottle P. 3 in this country is or will be guilty of "passing off," in that a purchaser of P. 3 will or may be led to suppose that he is purchasing the type of wine which is sold in England in the bottle with the label of P. 1 ; or, in other words, that a purchaser who desires to purchase the type of champagne which the plaintiffs sell in England in the form of the bottle P. 1 will be deceived into thinking that he is purchasing that wine, if he is offered the Brut wine in a bottle in the form of P. 3. That complaint resolves itself into this, that the plaintiffs complain that the distinctive marks which they have placed on the Brut type of their wine are insufficient to distinguish the Brut type from the wine in the bottle P. 1. I know of no case which would enable me to decide, or any principle on which I can decide, that a defendant who sells the Brut type of the plaintiffs' article under the very marks which the plaintiffs themselves think proper to use to distinguish that type can be accused of deception by the plaintiffs. Further, as a matter of fact, the evidence, so far from showing that there would be any deception, satisfied me that any one who chose to look at the label of P. 3 would see at once that its contents consist of that which they, in fact, do consist of—namely, the special Brut type of the plaintiffs' Dry Monopole Champagne: see the evidence of Dr. Moran, Mr. Woodhouse and Mr. Roberts.

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(1) 6 D. M. & G. 214, 217.

A point raised on this part of the case which I am, I hope, stating fairly, is that the distinctive marks placed on the P. 3 label by the plaintiffs were intended by them to be distinctive and were sufficiently distinctive only in the case of sales in France, and that on a sale in England the marks would not be sufficiently distinctive, and that the reason for adopting these insufficiently distinctive marks was that the plaintiffs did not intend or contemplate a sale in England, and that, in fact, the special marks would not be sufficiently distinctive in England. To this the answer is that the evidence of the plaintiffs' managing director shows that the plaintiffs have for many years known that the Brut wine did in fact reach England and was, in fact, sold in England, and if, with this knowledge, they placed on the brand a mark insufficient to distinguish it in England, the fault is theirs, and theirs alone. But I cannot find anything in the evidence before me to lead me to think that P. 3 with the plaintiffs' own label on it has deceived, or is likely to deceive, any reasonable purchaser, or has induced, or is likely to induce, him to believe that the wine which it contains is other than that which it in fact contains—namely, the plaintiffs' Brut Dry Monopole wine.

The second way in which the plaintiffs put their case is as follows. They admit, as I understood the argument of counsel, that before the year 1875 the law was as stated by Lord Cranworth L.C. in *Farina* v. *Silverlock* (1), where he speaks of "the legal right . . . . to have a particular trade mark to designate a commodity," and says: "This right cannot be properly described as a copyright, it is in fact a right which can be said to exist only and can be tested only by its violation, it is the right which any person designating his wares or commodities by a particular trade mark, as it is called, has to prevent others from selling wares which are not his marked with that trade mark in order to mislead the public and so incidentally to injure the person who is owner of the trade mark. The principle applicable to such cases has been often discussed, and although there may be one or two instances in the books in which a little difficulty may occur in the application of it, there is no difficulty in knowing what the principle is." It was, however, contended that the effect of s. 3 of the Act of 1875 (which enacted that the registration of a trade mark, prima facie, gave the registered proprietor the right to the exclusive use of such trade mark) was, not merely to give that proprietor by virtue of registration a statutory title in respect of his mark to the same rights which, before the Act, he could have obtained only by proving that the mark had become his trade mark but had the further effect of vesting in the owner of a trade mark the right to object to any person selling or dealing with goods produced by the owner of the trade mark with the trade mark affixed, except on such terms and subject to such conditions as to resale, price, area of market, and so forth, as the owner of the trade mark might choose to impose. It was, in effect, suggested that, whereas before 1875 a trade mark, if established as a trade mark, was a badge of the origin of the goods, the effect of s. 3 of the Act of 1875 was to make a registered trade mark a badge of control, carrying with it the right in the owner of a registered trade mark to full control over his goods, into whosesoever hands they might come, except in so far as he might expressly or by implication have released this right of control. I do not so read the section. Nor am I aware that, until the present case, any such construction of the section or of corresponding sections in subsequent Acts has been adopted by any tribunal; or indeed that, until very recent times, any such construction has been propounded to any tribunal. It would be astonishing, if in an Act to establish a register of trade marks, such a remarkable extension of the rights of owners of trade marks were intended to be enacted by the use of such terms as appear in the section. The section appears to me to mean that the proprietor of a registered trade mark is to have the right exclusively to use such trade mark in the sense of preventing others from selling wares which are not his marked with the trade mark. I do not believe that the legislature intended to say, or can fairly be held to have said, that the registration of a trade mark had the wide consequences suggested by the plaintiffs. It was, indeed, at first suggested that this remarkable alteration in the law took place when s. 39 of the Act of 1905 was enacted, but a comparison of the language of that section with s. 3 of the Act of 1875 led at once to a recognition of the fact that, if the change in the law did take place, it must have taken place in 1875 and not in 1905. Indeed, in my view, if there had been any possible doubt as to the construction of s. 3 of the Act of 1875, the doubt must necessarily vanish when the Act of 1905, which supersedes that of 1875 and the intermediate Acts, is examined. In the Act of 1905 the word "trade mark" is defined as a mark used upon goods for the purpose of indicating that they are the goods of the proprietor of the mark, and reading this definition into s. 39 it appears to me quite clear that the exclusive right to use the mark conferred on the registered proprietor by that section is the right to use the mark as a trade mark—i.e., as indicating that the goods upon which it is placed are his goods and to exclude others from selling under the mark wares which are not his.

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(1) 6 D. M. & G. 214, 217.

I was told by counsel that this point on the construction of the Acts was a new point not covered by authority and that I was free to act on my own view, whatever it might be, of the meaning of s. 39 of the Act of 1905 without troubling about any previous decisions. If that meant that the remarkable construction of that section now propounded had never before been submitted to the Courts and that the Courts had accordingly never had occasion to decide and had never decided that the suggested construction was wrong, I should agree. If, however, it meant that the decided cases throw no light on the matter, I must respectfully disagree. The question is whether the language used in s. 3 of the Act of 1875, and in corresponding sections of subsequent Acts, operated to extend the rights of the proprietor of a trade mark from a right to prevent deception as to the origin of the goods into a right to control dealings with the goods. If that was the effect of the statutory language, James L.J. used language of startling inaccuracy when five years after the Act he used, in *Singer Manufacturing Co.* v. *Loog* (1), the following language: "No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law." Then Fry L.J. five years later, in the case of *Edwards* v. *Dennis* (2) must, it would appear, have been guilty of similar inaccuracy when, speaking of an action for infringement of trade mark, he said: "As regards the action, it appears to me that, assuming the plaintiff's title under the Act, he is bound to show, either that the defendant has taken the whole or a substantial part of his trade mark, or that the defendant has used his, the plaintiff's, trade mark in such a manner as to lead the public to believe that his, the defendant's, goods are the plaintiff's." Then some twenty years later Romer L.J. must, on the construction which I am asked to accept of s. 39, have fallen

(1) (1880) 18 Ch. D. 395, 412.

(2) (1885) 30 Ch. D. 454, 478.

into grievous error when, in *Bow* v. *Hart* (1), he asks: "Where does the Patents, Designs and Trade Marks Act, 1883, confer any new right of property on the owner of a trade mark?" and goes on to say: "The Act is a statutory recognition of the law which had been previously laid down by the Court of Chancery, but it provides a better method of procedure." I cannot disregard what must at least be admitted to be indications of opinion by such judges as James, Fry and Romer L.JJ. For my own part, I do not see my way to accepting an entirely novel construction of language which has in effect figured on the statute book for fifty-four years, if the acceptance of that construction involves me in accusing James and Fry L.JJ. of inaccuracy and Romer L.J. of error. I prefer to adopt with approval, subject to a slight verbal amendment, a statement of the law in a well known text-book, Kerly on Trade Marks (2), and to hold that the use of a mark by the defendant which is relied on as an infringement must be a use upon goods which are not the genuine goods, i.e., those upon which the plaintiffs' mark is properly used, for any one may use the plaintiffs' mark on the plaintiffs' goods, since that cannot cause the deception which is the test of infringement.

The action will accordingly be dismissed with costs.

Solicitors: *Watson, Sons & Room; R. S. Fraser & Co.*

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(1) [1905] 1 K. B. 592, 593, 594.

(2) 6th ed., p. 451.

H. C. H.

LUXMOORE J.

1929

Nov. 18; *Dec.* 10.

In re DOUGLAS.

Ex parte THE EXECUTORS OF JAMES DOUGLAS.

[80 of 1929.]

Bankruptcy—Partnership—Deceased Partner's Share—Bankruptcy of surviving Partners—Proof by Executors of deceased Partner—Rejection by Trustee in Bankruptcy—Alleged liability of deceased Partner's Estate—Partnership Firm and another Firm—Right of Executor to prove in Competition with Partnership Creditors—Exception to Rule in Bankruptcy—Novation.

The rule that in the bankruptcy of a firm the executors of a deceased partner may not prove in competition with the creditors of his surviving partners may be inapplicable when the share of the deceased partner has been ascertained before the adjudication in bankruptcy, and no joint liability can be shown to exist.

On the death of a partner in a London firm a sum was found due to his estate from the surviving partners in respect of his share in the business, and certain claims and accounts between the deceased partner and another firm in Dundee (of which during his life he was also a partner, and which firm was after the death of the deceased partner a creditor of the London firm) were also compromised and settled by his executors before the bankruptcy of the London firm.

Held, that the proof of a debt put in by the deceased partner's executors in the bankruptcy of the London firm ought to be admitted.

MOTION.

The following statement of facts is substantially taken from the judgment of the learned judge. James Douglas by his will appointed one Samuel R. Hill and his son Aeneas Steuart Douglas and one W. S. Clark the executors thereof. At the date of his death on December 12, 1925, the said James Douglas was a partner with his son the said Aeneas Steuart Douglas and one John Herdman Stewart in the business of jute, flax and hemp merchants in London under the style or firm of James Douglas & Co. The partnership was constituted by articles of partnership, dated April 3, 1922. The material clauses of the articles so far as the motion was concerned were clauses 22 and 24. Clause 22 provided that: "In the event of the retirement or death of any of the partners during the continuance of the partnership, the said business shall survive to and be carried on by the surviving partners in accordance with the stipulations and provisions herein contained so far as the same may be applicable, and the share of profits to which the retiring or deceased partner was entitled shall (except as hereinafter appears in the case of the retirement or death of said James Douglas), be applied in rateable augmentation of the respective shares of the surviving partners in such profits, and a like account balance sheet and valuation shall be made up, taken and adjusted by and between the surviving partners or partner and the retiring partner or the executors or administrators of the deceased partner as the case may be, as is herein provided upon the determination of the partnership by effluxion of time, and the surviving partner or partners shall pay to the retiring partner or the executors or administrators of the deceased partner, as the case may be, the amount which on the taking of such account and balance sheet shall appear to be due to him or them, together with interest thereon at the rate of five pounds per centum per annum, computed from the day of the retirement of the retiring partner or of the death of the deceased partner, as the case may be, within twelve calendar months from the retirement or death of such deceased partner." Clause 24: "In the event of the retirement or death of the said James Douglas during the lifetime of the said Aeneas Steuart Douglas and John Herdman Stewart, and the partnership being continued by the said Aeneas Steuart Douglas and John Herdman Stewart, their respective shares (subject to the payment of all moneys due to the said James Douglas or to his personal representatives as the case may be) shall be as follows—Aeneas Steuart Douglas fifty-five per centum and John Herdman Stewart forty-five per centum."

In addition to the partnership constituted under these articles, the late James Douglas was also interested at his death in a business in Dundee, similar to that carried on by James Douglas & Co. in London. The partners in the Dundee business were the late James Douglas, James Ritchie, Mackenzie George Douglas and Aeneas Steuart Douglas. After the death of James Douglas, his son Aeneas Steuart

Douglas and John Herdman Stewart continued to carry on the London business in partnership, until January 24, 1929, on which day a receiving order was made on their own petition, the adjudication being made on the same day. Following the adjudication, the surviving executors of James Douglas (W. S. Clark having died in 1926), on or about April 25, 1929, lodged a proof of debt against the estate of the bankrupts for the sum of 37,575*l.* 13*s.* 7*d.* as being the amount due to the estate of the testator, the late James Douglas. On August 29, 1929, the trustee in bankruptcy gave notice of rejection of the executors' proof. On the death of James Douglas, it was shown that the appropriate account had been taken under clause 22 of the articles of partnership, and it was found that a sum of 32,878*l.* 19*s.* 6*d.* was due to the estate of the late James Douglas in respect of his capital, and this sum remained due at the date of the receiving order. There was no dispute as to the amount. Under the articles this sum was due from the continuing partners, who were liable to pay it to the estate of the deceased partner, with interest at 5 per cent. per annum from the date of the death of James Douglas until payment. Interest was in fact paid down to July 1, 1928, and a sum of 600*l.* had also been paid on account of subsequent interest, so that at the date of the receiving order, the amount due for interest was 936*l.* 16*s.* 5*d.*, less income tax less 600*l.* The learned judge stated that the figure for income tax was not in fact worked out in the proof of the executors, and he had calculated that the income tax on 936*l.* 16*s.* 5*d.* amounted to 187*l.* 7*s.* 3*d.*; and if this was correct the amount due for interest at the date of the receiving order was 149*l.* 9*s.* 2*d.* In addition to the amount due for capital and interest, the proof of the executors included a claim for 4278*l.* 0*s.* 6*d.*, being the market value of 4220*l.* nominal 5 per cent. Treasury Bonds 1932–1935, deposited by the late James Douglas on November 15, 1926, with the Bank of Scotland, as security for the firm's overdraft, together with interest on the 4220*l.* at 5 per cent. from August 1, 1928, (down to which date the late James Douglas had received the interest reserved on the bonds) to the date of the receiving order. This interest, after deducting tax, amounted as stated by the learned judge, to 81*l.* 17*s.* 2*d.* The total proof therefore was 37,388*l.* 6*s.* 4*d.* The learned judge further stated that except that he accepted responsibility for the calculation of the income tax in respect of the interest on the capital due to the late James Douglas, the parties had accepted the figures, and there was no dispute with regard to them.

The substantial ground on which the proof above referred to was rejected was set out under the heading (*a*) in the trustee's notice of rejection of proof, and was in the following terms: "That you have not proved to my satisfaction that there are no liabilities now existing incurred by the said firm of James Douglas & Co., London, while the late James Douglas was a partner therein for which the estate of the late James Douglas remains liable." A further ground of objection in the rejection of the proof was under the heading (*b*) in the following terms: "That the executors of the late James Douglas, on whose behalf you swore and lodged the said proof, are not entitled to prove against the estate of the above named debtors in competition with the creditors of the firm of James Douglas & Co., London, who became such while the late James Douglas was a partner in the said firm."

As already stated, the deceased had been a partner in a business in Dundee similar to that carried on in London. The two businesses had for years carried out many mutual business transactions, buying and selling jute and other produce from and to each other. On September 22, 1925, the London firm wrote to the Dundee firm stating that if the Dundee firm wanted to find employment for surplus capital, the London firm would take for the next three months 5000*l.* to 10,000*l.* at ½ per cent. above bank rate, which at the then present rate would result in the allowance of 5 per cent. interest, with increase or decrease in accordance with the fluctuation of the bank rate, with an option to the London firm to repay before the end of the year. The Dundee firm fell in with the suggested arrangement and sent 5000*l.* to the London firm on September 28, 1925. As between the Dundee firm and the London firm, the London firm from that date onwards kept two accounts: (1.) a loan account, to which the 5000*l.* already mentioned was carried, and (2.) a general account, in which the other transactions between the two firms were entered. As already stated, these transactions related mainly to the sale and purchase of jute and other commodities. When James Douglas died these two accounts were ruled off in the London books. At that date, the loan account showed a credit in favour of the Dundee firm of 5047*l.* 14*s.* 10*d.* and the general account showed a debit balance against the Dundee firm of 6169*l.* 17*s.* 6*d.*; the position being that if the accounts between the two firms had in fact been settled at that date, the Dundee firm would in fact have been debtors to the London firm in the sum of 1112*l.* 2*s.* 8*d.* Two fresh accounts were opened in the books of the London firm then constituted, by Aeneas Steuart Douglas and John Herdman Stewart, and these accounts were operated up to the date of the receiving order. At that date the amount shown to be due from the London firm to the Dundee firm was 2500*l.* There had been no fresh advance from the Dundee firm to the London firm as constituted after James Douglas's death, and there had in fact been a repayment to the Dundee firm in February, 1927, of 2500*l.* The general account between the Dundee firm and the new London firm began with a credit in favour of the latter of 6169*l.* 17*s.* 6*d.* and continued until March or April, 1926, when it was closed by a transfer to the private ledger of 62*l.* 1*s.* 1*d.*, so that in fact at the date of the receiving order, there was nothing to set off against the debt due on the loan account from the London firm to the Dundee firm.

A further fact was that at the date of James Douglas's death, he was a creditor of the Dundee firm to the extent of 9162*l.* 12*s.* 9*d.* Before the date of the receiving order, the Dundee firm had repaid to his executors 2650*l.* in respect of this 9162*l.* 12*s.* 9*d.* The failure of the London firm affected the Dundee firm, and negotiations took place between the executors of James Douglas on the one hand and the Dundee firm on the other, with a view to compromising the claims between them; and pursuant to an order made by Astbury J. on a summons taken out in March, 1929, by one of the executors of James Douglas, a sum of 4006*l.* 13*s.* 8*d.* was paid to the estate of James Douglas by the Dundee firm "in full and final settlement of the late James Douglas's interest in the Dundee firm, and in full settlement of all accounts, claims and demands between the Dundee firm and the estate of James Douglas."

The proof having been rejected as above stated, the executors now moved for an order that the rejection on August 29, 1929, of the proof of debt lodged by them on behalf of the estate of the late James Douglas for the sum of 37,575*l.* 13*s.* 7*d.* might be reversed, varied or discharged.

C. Tindale Davis for the executors. It is submitted that the trustee in bankruptcy has wrongly rejected the proof of the executors. Here the circumstances are different and are an exception to the rule as to a partner in a firm, the members of which are bankrupt, competing with other creditors of the firm, laid down by Lord Eldon in *Ex parte Sillitoe* (1), and referred to by Lord Selborne in *Ex parte Andrews.* (2) Further there can be shown here that a set-off exists: *Ex parte Morier.* (3)

E. G. Palmer for the trustee in bankruptcy. The proof was rightly rejected. If it had been allowed, the result would have been a competition between the estate of the late James Douglas and the Dundee firm, who were creditors of the London firm.

Cur. adv. vult.

Dec. 10. LUXMOORE J. This is a motion by the executors of one James Douglas for an order reversing, varying or discharging the rejection by the trustee in bankruptcy of a firm, James Douglas & Co., of a proof of a debt for 37,575*l.* 13*s.* 7*d.* The proof was put in and rejected in the following

(1) (1824) 1 Gl. & J. 374, 382. (2) (1884) 25 Ch. D. 505, 509.
(3) (1879) 12 Ch. D. 491, 498.

circumstances. [His Lordship stated the facts as substantially set out above.]

The proof was rejected on the ground that it has not been proved to the satisfaction of the trustee in the bankruptcy, that there are no liabilities now existing incurred by the firm of James Douglas & Co. while the late James Douglas was a partner therein, for which the estate of James Douglas remains liable. Evidence has been filed from which it appears that there are two possible liabilities which were incurred by the firm of James Douglas & Co. while the late James Douglas was a partner and no others. The two possible liabilities are the 2500*l.* due to the Dundee firm and a sum of 3*s.* 1*d.* to some other creditor. This last debt has been settled, and Mr. Palmer, who appeared for the trustee, very properly gave up any claim in respect of this nominal debt, but he relied on the existence of the 2500*l.* debt due to the Dundee firm. His argument was as follows: The estate of James Douglas is liable to the Dundee firm jointly with the partners in the London firm as it existed at the date of the receiving order, and therefore a proof by the executors of the late James Douglas, if allowed, would result in a competition by the estate of James Douglas with the Dundee firm, to which the estate is indebted.

The Dundee firm has in fact proved against the London firm for the 2500*l.*, and consequently if the estate of James Douglas is jointly liable with the members of the London firm for the 2500*l.*, a proof by the estate would necessarily result in the competition of that estate with the Dundee firm, which ex hypothesi is a creditor of the estate.

The rule that a person jointly liable with a bankrupt for a debt cannot prove in competition with a joint creditor is well established: see *Ex parte Andrews* (1), where Lord Selborne L.C. in delivering the judgment of the Court quoted the rule as stated by Lord Eldon in *Ex parte Sillitoe.* (2) The rule is stated in these words: " A partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself." Lord Selborne continued: "This rule extends to the case of a retired or deceased partner, when the continuing or surviving partners or partner have or has become bankrupt, but we think it is essential for its application that there should be some creditors proving under the bankruptcy for a debt or debts in respect of which the present or former partner, whose proof is excluded, and the bankrupt were jointly liable." The question is whether the rule applies to this case. Mr. Tindale Davis has argued that it has no application on three grounds. First he says that at the death of James Douglas, the Dundee firm was not in fact a creditor of the London firm as then constituted, for if you take into account all the transactions between the two firms there was a debit balance to the Dundee firm, and consequently a credit balance in favour of the London firm. In other words, if the Dundee firm had sought to recover the 5000*l.* money lent, the answer would have been—nothing is owing, and therefore you can recover nothing. It is true that at the date of the receiving order the London firm was in debit to the extent of 2500*l.*, and that this sum appeared as due on the loan account, but the indebtedness really arose from the wiping off, subsequent to the death of James Douglas, of the credit balance standing to the London firm on the general account. In law there was in fact at James Douglas's death but one account between the two firms, and taking the two accounts together, there was no debt. To quote from the judgment of James L.J. in *Ex parte Morier* (1): "The mere fact of the two accounts being put on different pages of the ledger could have no more effect than if an account had gone over from one page of the bank's ledger to another, or than if a man, as a mere matter of account, had kept different accounts, such as a farm account, a colliery account, or a house account, merely for his own convenience for ascertaining how moneys came in and how they had been applied." In my view this argument is sound, and is sufficient to prevent the application of the

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(1) 25 Ch. D. 505, 509.

(2) 1 Gl. & J. 374, 382.

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(1) 12 Ch. D. 491, 498.

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rule relied on by the trustee in bankruptcy in the present case, but I think it is right that I should deal with the two remaining grounds.

The second ground on which Mr. Tindale Davis relied as preventing the application of the rule was that the compromise agreement between the Dundee firm and the estate of James Douglas relieved the latter of any liability in respect of 2500*l.* (if any such liability in fact existed), with the result that the estate of James Douglas could not, in putting in a proof against the London firm as constituted at the date of the receiving order, compete with the Dundee firm in the distribution of the bankrupt estate at a time when that firm was itself a creditor of James Douglas's estate and the London firm in respect of a debt for which that estate and the London firm were jointly liable. In my opinion this ground also affords a complete answer to the claim that the rule applies, for the result of the compromise between the Dundee firm and the estate of James Douglas was to extinguish any joint liability (if such existed) in respect of the 2500*l.*

The third ground relied on was that, assuming that there was a joint liability for the money advanced to the London firm as constituted immediately before James Douglas's death, there was in fact a novation which resulted in the Dundee firm accepting the liability of the London firm as constituted immediately after the death of James Douglas, for the liability of the firm as constituted immediately before the death. It was suggested in the first instance that the way in which the London firm had dealt with the accounts in its books by ruling off such accounts at the death was itself sufficient, but I am unable to accept this by itself as constituting any novation; for there is no evidence that the fact was ever communicated to the Dundee firm or assented to by it. I think the continuation of the relationship between the Dundee firm and the London firm, without any claim against the estate of James Douglas, coupled with the fact that a proof for 2500*l.* was put in in the bankruptcy of the London firm, together constitute an election to treat the 2500*l.* as due from the London firm alone, and as such is

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equivalent to a novation of the agreement for loan; for unless the debt was in fact the debt of the London firm as constituted at the date of the receiving order, the Dundee firm could not have proved for such debt as against the joint assets of that firm, for ex hypothesi the debt would be the joint debt of the members of the London firm as constituted at the death of James Douglas.

On these grounds I am of opinion that the rejection of the proof of the executors of James Douglas was wrong, and I direct that their proof be admitted for the sum of 37,388*l.* 6*s.* 4*d.*, assuming that that is the correct sum, after adjusting the amount of the proof by deducting the appropriate sum in respect of income tax not deducted. The motion therefore succeeds, and the trustee must pay the applicant's taxed costs. The trustee's costs will of course be provided for in the usual manner.

Solicitors: *Roche, Son & Neale; Eland, Nettleship & Butt.*

A. R. T.

FARWELL J.

1929

Nov. 15, 19, 20.

In re MANSEL.

SMITH *v.* MANSEL.

[1929. M. 2016.]

Will—Construction—Shares of Residue—Advances in Lifetime of Testatrix —Adjustment between advanced and unadvanced Children—Hotchpot.

The testatrix by her will directed that her residuary estate should be held by her trustees upon trust in four equal shares for her four children for life with remainder over.

By the third and fourth codicils to her will the testatrix declared that two sums, amounting in all to 16,120*l.*, which she had advanced to her son, T. M., should be deducted from his share, and that his share should be less in amount than the shares of her other children by that sum.

The value of the estate of the testatrix was easily ascertainable as at the date of her death:—

Held, that for the purpose of the division of the actual income of the residuary trust estate of the testatrix, pending the appropriation thereof, the 16,120*l.* ought to be added for computation to the capital of the estate, valued as at the death of the testatrix, and deducted from T. M.'s share in the aggregate amount of capital so arrived at, and that the annual income ought to be divided between her four children and their respective issue in the proportions of their respective shares per stirpes of capital so arrived at.

In re Hargreaves [1902] W. N. 18; [1903] W. N. 24, 28; 88 L. T. 100 followed.

ORIGINATING SUMMONS.

By her will, dated June 30, 1920, the testatrix appointed her husband and the three plaintiffs—J. W. Woodhouse Smith, C. E. Forestier-Walker and W. G. Davy—to be her executors and trustees. She devised and bequeathed her residuary real and personal estate to her trustees for sale and conversion, and by clause 10 she directed that, after payment out of the proceeds of such sale and conversion of her funeral and testamentary expenses and certain legacies, they should stand possessed of the residue and of all property retained, unsold and unconverted (thereinafter called "the trust fund") upon trust to divide the same into four equal parts, and to stand possessed of such respective parts upon the trusts in favour of her children thereinafter set forth. By clause 11 the testatrix directed that the share of her daughter, the defendant, Lilian L. Smith, was to be held upon trust for her for life with remainder over; that the share of her daughter, the defendant, L. Forestier-Walker, was to be held upon like trusts; that with regard to the share of her daughter, the defendant, Gwladis L. Mansel, the trustees were to pay or apply the whole or such part of the income as they should think sufficient for the maintenance, support and benefit of Gwladis and any husband and issue of hers as they should think fit, and the testatrix continued: "To pay or apply such part of the income of Gwladis' share as shall not be paid to or applied for the benefit of my daughter, Gwladis, or any husband or issue of hers as income arising from the other three-fourth parts of the trust fund." The fourth share the testatrix directed the trustees to hold in trust for her son, the defendant, Trevor Mansel, for his life, and after his death upon the trusts contained in the will. By a third codicil to her will, dated April 30, 1923, the testatrix stated: "Whereas I have recently given and transferred to my son Trevor absolutely stocks and securities of the value of 11,000*l.* Now I declare and direct that the sum of 11,000*l.* . . . . shall be deducted from his one-fourth share in the trust fund mentioned in my said will and settled on him thereby, and accordingly that such trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner that the share of my son Trevor shall be less in amount than the shares of my other children by the sum of 11,000*l.*" By a fourth codicil to her will, dated June 18, 1924, the testatrix recited: "Whereas I have recently settled upon my son Trevor stocks and securities of the value of 5120*l.*, in addition to the stocks and securities amounting to 11,000*l.*, previously given and transferred to him. . . . . Now I declare and direct that the sum of 5120*l.* . . . . shall, in addition to the sum of 11,000*l.*, be deducted from his one-fourth share in the trust fund, ... and that such trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner that the share of my son Trevor shall be less in amount than the shares of my other children by the sum of 5120*l.* in addition to the said sum of 11,000*l.* . . . ."

The testatrix died on July 13, 1925, and her will was proved by the plaintiffs and the defendant, Trevor Mansel. At the date of her death the trust fund consisted partly of real estate, partly of mining rights, and there were a considerable number of securities, most of which were trust securities, and those that were not trust securities were quoted on the Stock Exchange. There has been no actual division of the residuary estate.

This summons now asked that it might be determined: (*a*) Whether for the purpose of the division of the actual income of the trust fund, pending the appropriation thereof, interest at the rate of 4 per cent. per annum on the sums amounting in all to 16,120*l.*, directed to be brought into account by the defendant, Trevor Mansel, ought to be added for computation to the actual income of the estate for the time being, and the aggregate amount of income so arrived at ought to be divided into four equal shares, and credited to the defendants or their respective issue, subject as to the income of the defendant Trevor Mansel's share to the deduction of interest on the sum of 16,120*l.*; or (*b*) whether the sum of 16,120*l.* ought to be added for computation to the capital of the estate and deducted from the defendant Trevor Mansel's share in the aggregate amount of capital so arrived at, and the annual income ought to be divided between the defendants or their respective issue in the proportion of their respective shares per stirpes of capital so arrived at.

Roger Turnbull for the plaintiffs. It is a question whether *In re Hargreaves* (1) or *In re Poyser* (2) applies.

Fawell for Trevor Mansel. I submit that *In re Poyser* (2) applies to this case and ought to be followed. The testatrix does not contemplate the division of anything but the income for some time.

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(1) [1902] W. N. 18; [1903] W. N. 24, 28; 88 L. T. 100.
(2) [1908] 1 Ch. 828.

In re Rees (1) shows that without exception there had been no previous case in which the method applied in *In re Hargreaves* (2) had been adopted. After *In re Hargreaves* (2) the Courts seemed to have considered that the general principle had been changed, and that it was necessary to find special circumstances to take a case out of *In re Hargreaves*: *In re Gilbert.* (3) Since *In re Poyser* (4) the Courts have held that that was the case to be followed, and that *In re Hargreaves* (2) only applied under special circumstances. In *In re Craven* (5) it was held that, owing to the difficulty in that case of realizing the shares forming the fund, *In re Poyser* (4) ought to be followed. *In re Forster-Brown* (6), in which *In re Hart* (7) was referred to, followed *In re Poyser* (4) and *In re Craven.* (5) *In re Cooke* (8) and *In re Tod* (9) dealt with *In re Hargreaves* (2) as a special case. When the final division of the trust fund comes to be made it must be by means of deduction.

Wilfrid Hunt for the other defendants. The trust fund in this case is easily realizable, and the principle of *In re Hargreaves* (2) ought to be followed. *In re Rees* (1) and that line of cases do not apply to the principle of *In re Hargreaves.* (2) Buckley L.J. in *In re Willoughby* (10) approved of *In re Hargreaves.* (2)

FARWELL J. The question which I have to determine arises in the administration of the estate of Lilian Augusta Mansel, and it relates to the method, pending the ultimate division of the estate, by which the son Trevor is to bring into account the sums which he is charged by the codicils —namely, the 11,000*l.* and the 5120*l.*

Two possible solutions of this question have been put forward. On behalf of Trevor it has been said that the right method to adopt is to take the whole of the actual income of the trust fund of the residuary estate, and to that income

(1) (1881) 17 Ch. D. 701.

(2) [1902] W. N. 18; [1903] W. N. 24, 28; 88 L. T. 100.

(3) [1908] W. N. 63.

(4) [1908] 1 Ch. 828.

(5) [1914] 1 Ch. 358.

(6) [1914] 2 Ch. 584.

(7) (1912) 107 L. T. 757.

(8) [1916] 1 Ch. 480.

(9) [1916] 1 Ch. 567.

(10) [1911] 2 Ch. 581, 600.

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a sum equivalent to 4 per cent. on the two sums of 11,000*l.* and 5120*l.* for the purpose of computation is added. Then divide that into four, and deduct from the share of income which belongs to Trevor's share a sum equal to 4 per cent. on 11,000*l.* plus 5120*l.*

On behalf of the other three shares it is said that the method to be adopted is this. The whole estate should be valued either at the death or at the end of the executors' year. To that value should be added for computation 11,000*l.* and 5120*l.*; the total should be divided into fourths: from the one fourth representing Trevor's share the 11,000*l.* and the 5120*l.* must be deducted, and the income is then paid on the footing that the shares of the persons interested in the residuary estate are of the respective amounts so arrived at.

The question I have to determine is, which of the two solutions put forward is the true one?

In *In re Rees* (1) the headnote is this: "A testator gave his residuary estate to his widow for life, with remainder to his children equally, with a proviso, in the common form, for bringing into hotchpot all sums advanced to any of them by him during his lifetime. The testator made advances to some of his children. In distributing the residuary estate among the children after the death of the widow:—*Held*, that the advanced children must bring their advances into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate; such interest to be computed from the death of the widow, and not from the dates of the respective advances or from the death of the testator."

It will be seen that the method adopted was the method which is now submitted to be the right method on behalf of Trevor. That was a decision of Sir George Jessel M.R. It is noticeable that in that case no method of accounting other than that which in fact the Court adopted was suggested, and the question that was argued was as to the rate of interest, and as to the date from which interest ran. All parties seem to have assumed that the method adopted was the right method. It may be, of course, that in effect it

(1) 17 Ch. D. 701.

would make very little difference or no difference in the actual total of the amount which method was adopted; but, however that may be, that method was adopted without argument.

The next authority to which I was referred is *In re Hargreaves.* (1) In that case the Court of Appeal came to the conclusion that the right method to adopt for bringing sums advanced into account was the method which the children of the testatrix in this case other than Trevor put forward, that is to say, by a valuation of the whole of the estate at the death or at the end of the executors' year, and payment of the income on the footing of that valuation. The will in *In re Hargreaves* (1) contained a somewhat unusual provision. Romer L.J. says (1): "He has not simply said the children are to take in equal shares, but that they are to take in shares which are to be ascertained by bringing in artificial sums as at his death, so that the true proportions of their shares in his actual estate can only be ascertained, as I have pointed out, by valuing the estate at his death." In that case undoubtedly the will was in an unusual form, and to that extent, of course, the decision is not an authority on any other case which may arise where the will is in a different form; but Romer L.J., whose judgment was the principal judgment of the court, made this statement (2): "It is true that the Court on occasions is obliged, in order to do justice between children or other parties, to put them on a state of equality, when no other method of doing it can be arrived at, to cause interest at some rate or other to be calculated, and treated as payable on account by some of the parties whose rights have to be adjusted; but the court never does that unless it is bound to." That statement of Romer L.J., in my judgment, was not merely with reference to the particular case he had to determine. Romer L.J. there points out that although there are cases in which the Court must resort to calculating interest upon the advances, unless the Court is driven to take that method, that is not a method that ought to be adopted; and that seems to me to be a statement by the Court of Appeal of a general principle

(1) 88 L. T. 100.

(2) 88 L. T. 101.

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which ought to be applied in these cases. As I understand the judgment of Romer L.J. it is the method which I am bound to apply, unless I am satisfied that this is one of the cases where, in order to do justice between the parties and put them on a state of equality, some other method should be adopted.

Under those circumstances it seems to me that, in considering the question before me, I have to bear in mind what Romer L.J. has there said, and to see whether this is a case in which the method adopted by the Court of Appeal in that case should be applied, or whether, because by adopting that method some injustice would be done, the other method ought to be adopted.

There have been cases since *In re Hargreaves* (1) in which the Court has found itself able to adopt the principle which I understand Romer L.J. thinks generally to be the right one, and other cases in which the Court has not been able to adopt that method. In *In re Gilbert* (2) Neville J. followed the decision in *In re Hargreaves* (1), and adopted the method which Romer L.J. in that case thought was, generally speaking, the right method to adopt, and similarly in *In re Hart* (3) Eve J. took the same course. But in the other cases cited to me the Court adopted the other method. In *In re Poyser* (4) Warrington J. came to the conclusion that the method adopted in *In re Hargreaves* (1) was not a method which was proper to the particular case he had before him. But as I read Warrington J.'s judgment he certainly did not treat *In re Hargreaves* (1) as being merely a decision upon the particular will in that case. I think he clearly treated it as a decision of general application, but one which he ought not to follow if he was satisfied that by following it some injustice to the parties would result. The learned judge was careful in his judgment to distinguish and point out the grounds upon which he came to the conclusion that he ought not to adopt the method which was adopted in *In re Hargreaves* (1); but I think it is clear from his judgment that he certainly

(1) 88 L. T. 100.
(2) [1908] W. N. 63.
(3) 107 L. T. 757.
(4) [1908] 1 Ch. 828.

did not treat that case as a case which could be disregarded. He came to the conclusion that the method adopted by the Court of Appeal ought not to be adopted in the case before him, and I think the conclusion that he came to was largely based on this, that in the will before him the testator had never contemplated or intended an immediate division of the property.

That was followed by a case of *In re Craven.* (1) That, again, was a decision of Warrington J., and he again came to the conclusion that the case before him was one in which the method adopted by the Court of Appeal in *In re Hargreaves* (2) could not be appropriately adopted. But again he is careful to consider the various cases, and to distinguish *In re Hargreaves* (2), because, I think, he felt that unless he was satisfied that the method adopted in *In re Hargreaves* (2) ought not to be adopted in that case, he would have been bound to adopt it.

The next authority is a case of *In re Forster-Brown* (3), a decision of Sargant J. In that case again Sargant J. did not feel himself able to adopt the method adopted by the Court of Appeal in *In re Hargreaves.* (2) He does use language in his judgment which suggests that in his view *In re Hargreaves* (2) was a case which had perhaps better not have been reported, was of no general application whatever; that it was merely a decision upon a particular will, and afforded no assistance to the Court in considering other wills in other forms. With great respect I doubt whether Sargant J. really intended to go so far as that. I think he was pointing out what is perfectly true, that *In re Hargreaves* (2) was a case where the will was in an unusual form, and that he was sounding a note of warning that the Courts ought not to treat *In re Hargreaves* (2) as laying down any general rule that that method ought to be adopted in every case. But I cannot think that Sargant J. was treating *In re Hargreaves* (2) as being a case which the Court was not bound to consider or as a case in which there was not

(1) [1914] 1 Ch. 358.
(2) 88 L. T. 100.
(3) [1914] 2 Ch. 584.

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stated the method which should be adopted, unless there were reasons for not adopting it. It is noticeable that Sargant J., himself, in considering the case of *In re Forster-Brown* (1), does point out clearly the reason why, in coming to his decision, he ought not to follow that of *In re Hargreaves.* (2) The principal reason why he thinks there is a distinction is that in the case before him the testator did not contemplate any immediate distribution of his estate, and in his judgment (3) he says: " In the present case it seems to me impossible to say that the testator contemplated any immediate distribution of his estate, or any ascertainment of the relative fractional shares of his children as at that date." That I think was the ground on which he felt that the method adopted in *In re Hargreaves* (2) should not be adopted in the case which he had to determine.

That case was followed by a decision of Younger J. in *In re Cooke.* (4) That case was decided during the war; and one of the grounds upon which Younger J. came to the conclusion that he ought not to adopt the method in *In re Hargreaves* (2) was that in that case there would be the greatest difficulty in obtaining a fair and proper valuation of the estate, and that, having regard to the fact that no satisfactory valuation could be made at the time, owing to the nature of the estate and the condition of affairs generally, it would be unfair, and might work serious injustice to adopt the method in *In re Hargreaves* (2), because the valuation that would have to be adopted might not represent the true value of the estate.

The last decision to which I think I need refer is a decision in *In re Tod.* (5) That was a decision of Sargant J., and in that case again he felt himself able to distinguish the case before him from the case of *In re Hargreaves.* (2) When I say " distinguish," I mean that he considered the method adopted in *In re Hargreaves* (2), and he came to the conclusion that to adopt that method in the case before him would

(1) [1914] 2 Ch. 584.
(2) 88 L. T. 100.
(3) [1914] 2 Ch. 592.
(4) [1916] 1 Ch. 480.
(5) [1916] 1 Ch. 567.

be possibly to effect an injustice and that therefore he did not adopt it.

In my judgment the result of all these authorities is that this Court is, at any rate, bound to approach this question having in mind the statement in Romer L.J.'s judgment in *In re Hargreaves* (1), that the Court does not resort to the method of taking interest on the amount of the advances for the purpose of arriving at how the accounting is to be done, unless it is bound to do so. The later cases, I think, show that there are at any rate two grounds upon which the method adopted in *In re Hargreaves* (1) should not be adopted: (1.) if the nature of the residuary estate, or of a substantial part of the residuary estate, is such that no fair and proper valuation can be arrived at; for instance if the estate or a substantial portion of the estate consisted of shares in a private company not quoted on the Stock Exchange, there might obviously be the greatest difficulty in arriving at a fair valuation of the property, and to adopt the rule in *In re Hargreaves* (1) might, in a case of that kind, result in very great injustice: and (2.) if, on considering the will as a whole, the Court comes to the conclusion that the testator never intended or contemplated an immediate division, then I think the Court again says that the method adopted in *In re Hargreaves* (1) should not be adopted; and I think it says so because it takes the view that if the testator clearly did not intend an immediate division, he must be taken to have contemplated that pending the ultimate division, advances would have to be brought into account by some method other than an immediate division on valuation.

Under those circumstances, it seems to me that I have to approach this question for the purpose of seeing whether there is anything in the circumstances of this case or in the language of the will itself which makes the method adopted in *In re Hargreaves* (1) not a suitable method to apply in the present case.

So far as the nature of the property is concerned, I fail to see that there is any real difficulty in arriving at a

(1) 88 L. T. 100.

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reasonable and fair valuation of the property as at the death of the testator, or as at the end of the executors' year, and that therefore the nature of the property itself is not such as to compel me to adopt some method other than that adopted by the Court of Appeal in *In re Hargreaves.* (1)

Now is there anything in the will which leads me to the conclusion that the testatrix did not contemplate or intend an immediate division? I think here I should say this: that in my judgment the method adopted in *In re Hargreaves* (1) is one which is not excluded merely because one finds in the will that the testator may have contemplated that there should either be an immediate division, or that there might be a postponement of that division. I think the method adopted in *In re Hargreaves* (1) is only excluded if one finds that the testator in his will did not intend or contemplate an immediate division. There does not appear to me to be in this will anything which indicates that the testatrix did not contemplate the possibility of an immediate division of her property. She gave certain annuities, but there was no difficulty about making provision for those annuities, and, subject to that, having a division of the estate.

The direction in the will to invest I must refer to, because some reliance was placed upon it. It is in para. 10 of the will. The direction is: "My trustees shall invest the residue of the said money in their names"—that is the proceeds of sale; she directed a sale and conversion with power to postpone—"or under their control in or upon any of the investments hereby authorised with power for my trustees at discretion to change such investments for others of a like nature and shall stand possessed of all such investments or varied investments." Now that does, I think, show that the testatrix contemplated that there might be a period between the death and the division, because she contemplated that there might be a change of investments after her death. Then the clause proceeds: "and of all property retained unsold and unconverted under the power aforesaid or forming part of my residuary

(1) 88 L. T. 100.

estate . . . . upon trust to divide the same into four equal parts." That does not necessarily mean or imply an immediate division, but I do not think that there is anything to indicate that the testatrix did not contemplate that there might be an immediate division.

When one comes to look at the form of the third codicil one finds this expression: "Now I declare and direct that the sum of 11,000*l.* the value of the stocks so given and transferred by me to my said son as aforesaid shall be deducted from his one fourth share in the trust fund mentioned in my will and settled on him thereby and accordingly that such trust fund shall be divided between my children among whom the same is directed to be divided by my will in such manner" etc. There the testatrix is obviously contemplating a division, although it is not inconsistent with a division at some date later than the death or the end of the executors' year.

Taking the will as a whole, it seems to me that I cannot say that there is in this will any clear indication to show that the testatrix did not contemplate the possibility of an immediate division of her estate; and since the nature of the property is such that there is no reason why the method in *In re Hargreaves* (1) should not be applied in this case, and there is nothing in the will which indicates that an immediate division was not intended or contemplated by the testatrix, I think I am bound to give effect to what the Court of Appeal said in that case.

I therefore come to the conclusion that this is a case in which the method adopted by the Court of Appeal in *In re Hargreaves* (1) should be adopted, and I propose to make a declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills, for Davis, Lloyds & Wilson, Newport, Mon.; Routh, Stacey & Castle, for Thring, Sheldon & Ingram, Bath.*

(1) 88 L. T. 100.

P. J. B.

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Nov. 13.

MACDONALD v. THE GREAT WESTERN RAILWAY COMPANY.

[1929. M. 979.]

Railway—Amalgamation under Railways Act, 1921*—Claims by Transferred Employees for Compensation—Claims not " determined " within Meaning of Act—Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 120, *sub-ss.* 1, 4*—Railways Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *Sch. III.*

The plaintiffs were transferred to the company's employment when it became an amalgamated company under the provisions of the Railways Act, 1921. In accordance with the Third Schedule to that Act (incorporating s. 120, sub-s. 1, of the Local Government Act, 1888) they put forward claims to compensation for loss suffered by reason of the amalgamation. Para. 4 of the Third Schedule to the Railways Act, 1921, provides that any question whether the provisions of para. 3, dealing with the transfer of existing officers or servants, has been complied with, should be referred to a Standing Arbitrator or board of arbitrators appointed by the Lord Chancellor, and para. 5 provides that claims shall be determined in accordance with s. 120 of the Local Government Act, 1888, with the necessary modifications. By sub-s. 4 of that section, the time for appeal to a Standing Arbitrator is fixed at three months from the date of the determination. The claims were discussed at a meeting held on April 26, 1928, at the company's registered office. L., the company's assistant general manager, concluded by asserting that the cases of all the plaintiffs were governed by a decision of the Standing Arbitrator refusing the claim of one B., but no formal letter refusing the claims was sent to the plaintiffs or their solicitor. It was subsequently contended on behalf of the railway company that the company had given its "determination" of the claims, within the meaning of the Railways Act, 1921, at the meeting of April 26, and that the proposed appeals were out of time. In an action by the plaintiffs for a declaration that their claims were not determined by the company on April 26, 1928, within the meaning of para. 5 of the Third Schedule to the Railways Act, 1921, or at all:—

Held, that decisions on claims for compensation must be formulated in a definite manner in the name and on behalf of the company and communicated forthwith to the claimants; and that on the facts there had been no such determination.

ACTION.

The Great Western Railway (hereinafter called " the company ") became an amalgamated company as a result of the provisions of the Railways Act, 1921. The Third Schedule to that Act contains a number of provisions the purpose of which is to provide compensation for certain existing officers and servants of the constituent or subsidiary companies which are amalgamated, being servants who suffer some pecuniary loss by reason of the amalgamation or absorption. The officers and servants so provided for are those who, for a period of not less than five years before the coming into force of the Act, have been officers or servants of any constituent company or subsidiary company, with the exception of three classes—namely, (i.) those who become pensioners or annuitants in accordance with the rules of any railway pension or superannuation fund; (ii.) those who have voluntarily retired; (iii.) those who have been removed from the service of any constituent or subsidiary company by reason of misconduct or incapacity. Those in none of these three classes are subject to the provisions in paras. 1 to 6 of the Third Schedule. (1)

Among the economies which the amalgamation was intended to effect was the abolition of the office or situation of any existing officer or servant deemed to be unnecessary: and it was also intended to require further duties to be performed by some of the officers or servants. The Act contains a number of provisions for their protection, and para. 5 provides for compensation for pecuniary loss being given to those (i.) whose situations are abolished, (ii.) who relinquish their offices or services, as previously provided by the Act, (iii.) whose services are dispensed with on the ground that they are not required, or for any reason other than misconduct or incapacity, (iv.) whose salary, wages or remuneration are reduced, and (v.) who suffer any direct pecuniary loss by reason of the amalgamation or absorption.

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(1) Para. 2: "The amalgamated company may abolish the office or situation of any existing officer or servant which they deem unnecessary, and any existing officer or servant required to perform duties such as are not analogous or which are an unreasonable addition to those which as an officer or servant of the company from whom he was transferred he was required to perform may relinquish his office or situation."

Para. 3: "No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole (including tenure of office, remuneration, gratuities, pension, superannuation, sick fund or any benefits or allowances whether obtaining legally or by customary practice of the constituent or subsidiary company) as compared with the conditions of service formerly obtaining with respect to him."

Para. 4: "If any question arises as to whether the provisions of the last foregoing paragraph have been complied with, the question shall be referred to a standing arbitrator or board of arbitration appointed by the Lord Chancellor, and, if the arbitrator or board consider that those provisions have not been complied with, and that the officer or servant has thereby suffered loss or injury, they shall award him such sum to be paid by the amalgamated company as they think sufficient to compensate him for such loss or injury."

Para. 5 of the Third Schedule provides further that compensation shall be determined "in accordance with the provisions contained in s. 120 of the Local Government Act, 1888, relating to compensation to existing officers, and those provisions shall apply accordingly as if they were here re-enacted with the necessary modifications." (1)

The plaintiffs, of whom there were nineteen, were men who had been employed as part of the dredging staff either of the Taff Vale Railway Company or of the Cardiff Railway Company in South Wales ports. They were occupiers of many different positions, from that of master of the dredger to that of greasers, engineers, and deck hands. Early in the year 1927, the National Union of Railwaymen took up negotiations on their behalf, substantial correspondence took place, and Mr. C. T. Cramp—on behalf of the National Union of Railwaymen, which was acting as the plaintiffs' representative—

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(1) Local Government Act, 1888, s. 120, sub-s. 1: "Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office."

epeatedly asked the company or its then general manager, Sir Felix Pole, to give a decision as to compensation.

On April 5, 1927, Mr. Cramp wrote to Sir Felix Pole:—

"Dredging Staff—South Wales Ports.

With reference to previous correspondence in connection with the above I enclose forms showing in detail the claims of the men named on the attached list for compensation under the Third Schedule of the Railways Act, 1921.

The claims are in respect of alterations in the conditions of employment of the men as a result of changes made in the working of the dredging plant, and I shall be glad if you will let me have your observations when you have examined the forms.

There are two further claims outstanding in respect of Joseph Henry Pearce, Deck Hand, Penarth, and Stanley Dow, Fireman, Penarth, but the forms have not yet been completed."

After further letters from Mr. Cramp, the following letter, written on behalf of Sir F. Pole, was sent to him on August 29, 1927:—

"With reference to your letter of the 11th inst., and conversation with your representative, I have to say that the matter is under consideration, and I will write you further as soon as possible."

This was followed by a further letter to Mr. Cramp dated September 22, 1927.

"With reference to your letter of the 20th instant, the whole of the men's records are being examined, and, as you will appreciate, this is taking time. I will, however, reply definitely as early as possible."

In November, 1927, the company came to the conclusion that it would be better and fairer in the interests of the plaintiffs that there should not be a decision based on the particulars of claim, coupled with the statutory declarations which had been forwarded to the company, but that it would be better to have a meeting at Paddington early in the New Year, at which the matter could be discussed, the contentions for the plaintiffs being put forward by some one acting on their behalf, and the contentions for the company also being stated. Ultimately, a meeting was arranged and held on January 16, 1928, at which the various facts were discussed: but it was found that further information was necessary, and nothing was then decided. Mr. J. F. Lean, an assistant to the general manager of the company, Sir Felix Pole, was present at the meeting, and the company was also represented by several of its employees. The views of the plaintiffs were put forward by Mr. John Marchbank, assistant industrial secretary to the National Union of Railwaymen. On January 31, 1928, Mr. Cramp wrote to Sir Felix Pole:—

"Referring to the interview between our respective representatives on the 16th instant, I am sending you herewith copies of the statements which embody the approximate amounts claimed by each of the men concerned.

These statements differ somewhat from those already made to you, but, as you will realize, the lapse of time only tends to increase the amounts due, and what are sent to you now are up to December, 1927. Perhaps you will bear this in mind, and, at a later stage be good enough to let me have your observations on the cases. You might also suggest a suitable date for a further interview on the subject."

The correspondence continued, and on April 26, 1928, at a meeting at Paddington, at which Mr. Lean and Mr. Marchbank were, and Sir Felix Pole was not, present, the plaintiffs' claims were discussed. Mr. Lean contended that the cases of all the plaintiffs were governed by a decision of the Standing Arbitrator refusing the claim of one Bates, and Mr. Marchbank contended that the facts in Bates' case were different from the facts in the plaintiffs' cases. Mr. Lean concluded by saying that he was not prepared to make any allowance to the men.

On October 6, 1928, the plaintiffs' solicitors wrote to the company:—

"Railways Act, 1921. Dredging Staff—South Wales.
Macdonald and others *v.* G. W. R. Co.

We have been instructed by the above mentioned employees of the Great Western Railway Company, with reference to their claims under the Railways Act, 1921, in respect of the alterations in their conditions of service consequent upon the abolition by the Great Western Railway of the South Wales subsidiary companies.

It appears that claims were submitted some time back, but, up to the present, no determination has been come to with respect to them. We shall be glad, therefore, if you would kindly give the matter your early attention, so that the claims may be dealt with.

If it is the intention of the company to determine that nothing is payable to our clients in respect of these claims, we suggest that it would be a measure of convenience if, instead of the whole body of claims being determined, a selected two or three of the same be dealt with only, the rest being allowed to stand in abeyance so that the somewhat unnecessary expense of nineteen separate appeals to the Standing Arbitrator may be avoided if possible."

To this Mr. Lean himself replied, on October 9 :—

"With reference to your letter of the 6th instant, claims on behalf of the nineteen men referred to were submitted to the company by the National Union of Railwaymen, and at a meeting held at Paddington on April 26 last, with the Assistant General Secretary of that Union, it was intimated that in the company's view the principle in all these cases was governed by a previous decision of the Standing Arbitrator, viz. :—one relating to R. H. Bates dated March 21, 1928, and that the men had no tenable claim to compensation. It may be taken, therefore, that the company determined, on April 26, 1928, that the nineteen men in question are not entitled to compensation under the provisions of the Railways Act, 1921.

If the men now propose to submit appeals to the Standing Arbitrator, the company will consider whether they will not object to go forward with two or three selected claims, provided the names of the claimants are submitted in the first instance."

And in answer to a further letter from the plaintiffs' solicitors, he wrote, on November 27, 1928 :—

"With reference to your letter of the 21st instant, I have to say that claims dated January, February, or March, duly verified by statutory declaration of the men concerned, were received from the National Union of Railwaymen, acting as their agents, on April 6, 1927. I would repeat that the company gave their 'determination' of the claims, within the meaning of the Railways Act, 1921, at the meeting with Mr. Marchbank, representing the National Union of Railwaymen, on April 26, 1928. As the cases have not yet been submitted to the Standing Arbitrator, I am advised they are now out of time."

The plaintiffs accordingly claimed in this action a declaration that claims duly made by them and submitted to the defendant company on April 26, 1928, pursuant to para. 5 of the Third Schedule to the Railways Act, 1921, were not determined by the defendant company on April 26, 1928 (as alleged by the defendant company in a letter of November 27, 1928), within the meaning of cl. 5 of the Third Schedule to the Railways Act, 1921, or at all.

Gavin Simonds K.C. and *Walter Frampton* for the plaintiffs. It is true that more than three months passed between the meeting of April 26, 1928, and the letter from Mr. Lean, of November 27 of the same year, stating that the plaintiffs were by then "out of time." But at that meeting there was no determination by the company (as contemplated by the Railways Act, 1921, and the Local Government Act, 1888) of the claims for compensation: there was merely an expression by its assistant general manager of his own personal opinion that all the plaintiffs' cases were covered by Bates' case. There is no evidence that the company's board of directors, its general manager, or its solicitor, agreed with that opinion, or that Mr. Lean had been authorized to pronounce it as the company's definite and binding decision. There has therefore been no decision of the plaintiffs' claims; and as that decision is a condition precedent to an appeal to a Standing Arbitrator, the plaintiffs are not out of time for that appeal.

Howard Wright and *Hon. S. O. Henn Collins* for the defendant company. The plaintiffs' claims were considered by the defendant company when they were received, and were duly decided: and the defendant company's decision was communicated orally by Mr. Lean to Mr. Marchbank, as the plaintiffs' representative, at the meeting of April 26, 1928.

MAUGHAM J. This is a curious and an interesting case, and it has been well argued on both sides, but I have come to a clear conclusion upon it. It is a curious case, because it relates to a claim put forward on behalf of nineteen persons who allege that they were, at the date of the passing of the Railways Act, 1921, existing officers or servants of a constituent or subsidiary company which was being amalgamated with the Great Western Railway Company. The only question to be determined, in substance, is whether a claim to compensation by those nineteen men was a claim on which the defendant company, the Great Western Railway Company, gave a decision on April 26, 1928, and of which they communicated the effect to the plaintiffs or to their representative. Accordingly, the plaintiffs are claiming a declaration that those claims were not determined by the defendant company on that date, as the defendant company alleges. The matter involved is mainly a question of fact: but there is also involved in it something which, I think, requires a consideration of the statutes as a result of which the claims were made. [His Lordship then stated the facts, and continued:]

It is perfectly plain, I think, from the provisions of s. 120 of the Local Government Act, 1888, as incorporated into the Third Schedule of the Railways Act, 1921, that the matter is regarded by the Legislature as one of great importance, and the ascertainment of the amount of compensation or an adverse decision is one which is hedged round with a number of very careful and somewhat elaborate provisions, e.g., the necessity for a claim under the hand of the claimant, and, indeed, his statutory declaration under the Statutory Declarations Act, 1835. Moreover, it is plain that the just amount of compensation, or the decision that no compensation is payable, must be decided in a definite manner, and that

MAUGHAM J.

1929

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the decision, having been made, has to be communicated at once—or, to use the exact word, "forthwith"—to the claimant. One reason for that provision is that, since the person to pay, at any rate in the present case, is the person to make the decision in the first instance, it is obviously desirable that the claimant should have a right of appeal: and the Local Government Act, 1888, s. 120, sub-s. 4, provides as follows. [His Lordship read the sub-section, incorporated, with the necessary modifications, in the Railways Act, 1921, by virtue of para. 5 of the Third Schedule thereto, and continued :] (1)

There is a substantial correspondence before the vital day, April 26, 1928. It is not immaterial to mention that all the letters are addressed to Sir Felix Pole, general manager, and the replies are replies from the Great Western Railway General Manager's Office, and are signed in the name of or by Sir Felix Pole. Some of the letters have, in addition to the signature "F. J. C. Pole" the initials "J. F. L.," or the signature "J. F. Lean." I should infer from that that Mr. Lean is purporting to act on behalf of the general manager, by virtue of a delegated authority from him. However, on April 26, there was a meeting which dealt with a number of matters, among them being the claims of the nineteen members of the dredging staff who are the plaintiffs in this action. I have had the advantage of having Mr. Marchbank and Mr. Lean in the box before me, and they have given their recollections of what took place. The note of Mr. Marchbank, made two or three days afterwards from rough notes, has been put in without objection, and, in my view, represents with substantial accuracy what took place. I think I ought to read it. It says: "Mr. Lean stated that since the last interview further inquiries had been made, and it had been definitely established that at certain periods a number of the men referred to had been stood off—i.e., dismissed without a continuance of pay because their services were not needed—and on these grounds he contended that they were not in any way affected as a result of amalgamation, and particularly having regard to the claim made by R. H. Bates, which was dealt with by the Standing Arbitrator, and the company established their claim with costs. In view of these facts he was not prepared to make any allowances on behalf of the men." That, as I think the other evidence shows, is substantially the way in which this part of the interview began. A case relating to one Bates had been dealt with by the Standing Arbitrator, and had been decided in favour of the company, and this paragraph of the account of what took place is, I think, an accurate statement of Mr. Lean's view that the nineteen cases were decided inferentially by Bates' case. Then follows this: "Mr. Marchbank stated that, whilst he could not dispute the fact that Bates' claim had failed, it was not on all fours with the claims submitted by the Union"—i.e., these nineteen claims—"inasmuch as Bates was taken into the service in 1915 in the place of a man who had gone to the army, and on these grounds was deemed to be temporary. With regard to the claims submitted, Mr. Marchbank contended that they were permanent employees by reason of the fact that they had been exempted from unemployment insurance. Mr. Lean in reply stated that this was not the only case that had arisen since the small lines were taken over and it had been found that numbers of men had been exempted who should not have been exempt, and were subject to dismissal and were discharged. Other men who were not exempted"—i.e., from unemployment insurance—"should have been exempted; and he intimated that it was the company's intention to bring all these men under unemployment insurance, as they could not guarantee them employment. Mr. Marchbank suggested that, as Bates' claim was not on all fours with the claims submitted by the Union, two or three of the cases should be taken before the

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(1) Sub-s. 4: "If a claimant is aggrieved by the refusal of the county council to grant any compensation, or by the amount of compensation assessed, or if not less than one third of the members of such council subscribe a protest against the amount of the compensation as being excessive, the claimant or any subscriber to such protest (as the case may be) may, within three months after the decision of the council, appeal to the Treasury, who shall consider the case and determine whether any compensation, and if so, what amount ought to be granted to the claimant, and such determination shall be final."

Standing Arbitrator, and, if such was agreed to, he was prepared to accept the decision as applicable to all concerned. To this Mr. Lean would not agree, and he intimated that, if the Union contended that any of the cases were not on all fours, they could contest same. He was not prepared to agree to anything except given by the Standing Arbitrator."

I do not regard the evidence given before me, either by Mr. Marchbank or by Mr. Lean, as, in effect, adding anything to that statement of what took place, and I do not think that I have any facts upon which I can rely, beyond that statement, as showing what really did take place, except an important letter signed by Mr. Lean on behalf of Sir Felix Pole on October 9, 1928, after the claim had been made by the men. In that letter Mr. Lean says: [His Lordship read the letter and continued:] That is a letter which Mr. Lean himself wrote, and, again, I think it is a perfectly accurate statement of what took place on April 26; and it seems to me to accord precisely with the note of Mr. Marchbank which I have already read. A distinction has been made which seems to me to be obvious: it is one thing for Mr. Lean, at such a meeting as that, to express the view that Bates' case covers the whole of the nineteen claims, and that accordingly, in his view, the company must reject the whole of them; but it is an entirely different thing for him to purport, on behalf of the company, to give a definite decision on this important matter so as to bind the company, whether or not the general manager or the board or the solicitor for the company were disposed to agree with his view. It is not immaterial to note that Mr. Lean, at this time, was only the assistant to the general manager. Nor it is immaterial to observe that there is no letter written on behalf of the company stating that at this interview the matter is going to be decided. The letters, indeed, show that what was to happen at the interview was a discussion. It is urged that Mr. Marchbank went away knowing that the case had been decided against the nineteen claimants. I think that it is extremely likely that Mr. Marchbank went away knowing that, as a result of Mr. Lean's view, the case would be definitely decided against his clients: but Mr. Marchbank himself has told me that he was expecting a formal communication, and having listened with the greatest care to the whole of the evidence, I think that was the right view. If this note made by Mr. Marchbank accurately states what took place—as I think it does—and if the letter of October 9, 1928, signed by Mr. Lean, is an accurate account of what took place, I think that the reasonable conclusion for Mr. Marchbank to come to was that Mr. Lean was against him and would report in such a sense that it would be almost certain that the claims of these nineteen people would be wholly rejected. The final reference in Mr. Marchbank's note points in the same direction. Mr. Lean was there, being asked to consent to hold his hand, and for this reason: if the nineteen cases were the subject of an immediate decision, there would have to be nineteen appeals. The suggestion of Mr. Marchbank, as I understand it, is this: "Let the company not decide any more than three cases at the present time—although I know that its opinion is against the whole number—in order that these three may be taken to the Standing Arbitrator and costs may thus be saved." I cannot see any use in such a suggestion if the fact was that Mr. Lean had already decided the nineteen cases.

I would add that, in my opinion, the company must be irrevocably bound by its own decision, just as a county council must be bound by its own decision under the Local Government Act, 1888. In the present case, dealing with a railway company, the decision need not be under the seal of the company: but if it is a decision announced or communicated by an agent of the company, it must, in my view, be asserted as a decision made in the name of and binding on the company, so that the claimants may know that they have only three months from that date in order to appeal: and I do not think that it is right for the Court to draw an inference of final determination from the fact that an agent of the company announces his view that, in fact, that is to be the decision of the company. Matters of expediency as well as matters of law might enter into the case, and it should be observed that the nineteen claims are not altogether claims by the same class of people. It might have emerged, on a further consideration in the company's office, that some, at any rate, of the nineteen were claims with regard to which the decision in Bates' case which the company were treating as final, would not be final. In my opinion therefore, there was not on the date in question a decision by the company within the meaning of the two Acts of Parliament to which I have referred.

I must add that I am not satisfied that Mr. Lean, wide as his authority was in some respects, had authority to decide this important matter on behalf of the company without the approval of Sir Felix Pole, or, it may be, the decision of the board. It is to be noted, as I have already said, that every letter is signed in the name of Sir Felix Pole: it is to be observed that the chart which purports to state the arrangement of duties in the general manager's office does not expressly give to Mr. Lean authority to make decisions under the Third Schedule of the Railways Act, 1921; and, finally, it is to be considered that decisions of this nature, pursuant to the provisions of an Act of Parliament, are decisions of great importance, involving as they do matters of justice to employees or servants who have been engaged for a number of years by the constituent or subsidiary companies, and involving also the possibility of trouble to the amalgamated company if they are not dealt with with the greatest care and evident authority.

My decision, however, is based on the view that no such decision as is contemplated by the Acts was given, in this case, on behalf of the company: I am prepared to make a declaration to that effect, and I presume that the company will be glad, in the circumstances, to pay the costs of the action.

Solicitors: *Pattinson & Brewer; A. G. Hubbard.*

K. R. A. H.

In re ROSS.

ROSS *v.* WATERFIELD.

[1928. R. 1040.]

LUXMOORE
J.

1929

July 19, 22,
23, 24, 25;
Nov. 14.

Conflict of Laws—Renvoi—English and Italian Testamentary Dispositions by Widow—British Domicil of Origin—Italian Domicil at Death—Claim of Son to Legitima Portio—Italian Municipal Law—Movable and Immovable Property—Lex situs—" The Law of the Domicil."

The law of the domicil, which governs the succession to movable property belonging to British nationals dying domiciled in a foreign country :—

Held, on the English authorities to mean the whole law of the country of domicil, including the rules of private international law administered by its tribunals. The English Courts are therefore solely concerned to inquire what the Courts of that country would decide in the particular case.

An Englishwoman whose domicil of origin was English but who at the date of her death was a widow, domiciled in Italy, by her testamentary dispositions excluded her son (and only child) from any participation in her movable and immovable property situate in Italy and in her movable property situate elsewhere than in Italy :—

Held, that the question whether the son was entitled to a moiety of her estate as his *legitima portio* must be decided in accordance with the view that the Italian Courts would take of the English law. On the evidence adduced that view appeared to be that the testamentary dispositions of the testatrix were valid, and made proper provision for the dispositions of her property in Italy, and that the son's claim to any part of her estate as his *legitima portio* would not under any circumstances be recognized, as it would have been if the testatrix had been an Italian national.

As regards the immovable property of the testatrix situate in Italy :—

Held, that as the lex situs must be held to govern the succession to immovables, the law of the country where the immovables are situate must determine the right of succession, and the evidence showed that the Italian Courts would decide the question of the succession in the same manner as the English Courts would determine it, if the immovable property belonged to an Englishman and was situate in England.

ACTION.

By his statement of claim the plaintiff claimed a declaration (inter alia) that by virtue of the domicil of his mother at the date of her death (the domicil being Italian), he, as her only child, was entitled, notwithstanding her testamentary dispositions (under which he derived no benefit), to one moiety

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of her movable and immovable property situate in Italy, and to one moiety of her movable property situate elsewhere than in Italy; and also that so far as might be necessary that the personal estate of the testatrix (other than assets locally situate in Italy) might be administered by the Court with all necessary accounts and inquiries.

The following statement of facts is substantially taken from the judgment of Luxmoore J.:—

The plaintiff, Alexander Gordon Ross, was the only child of Henry James Ross and Janet Anne Ross his wife, and was born in the year 1862. His father, Henry James Ross, was born on March 9, 1820, in the island of Malta. There was some suggestion on the part of the defendant that Henry James Ross was illegitimate, but on the evidence adduced in the action, the learned judge said that in his opinion it would be quite impossible to come to this conclusion, and he was satisfied that on the evidence before him, he was bound to hold—as in fact he did—that Henry James Ross was the legitimate son of his parents, that he was born in Malta, and consequently that he was of British nationality, his domicil of origin being Maltese. Henry James Ross resided with his parents in Malta until the year 1837. In that year he became an officer in the British consular service, and in 1839 having left that service, entered a cotton business at Alexandria in Egypt and went to reside there. In the year 1860 he came to England on a visit, and while in England married at Ventnor, in the Isle of Wight, Janet Anne Duff Gordon, a daughter of Sir Alexander Cornwall Duff Gordon, Baronet, and Dame Lucy Duff Gordon, his wife. It was admitted for the purposes of the action, that Sir Alexander and Lady Duff Gordon were British subjects, and that their domicil of origin was English, and consequently that the domicil of origin of their daughter Janet Anne was also English. Janet Anne Duff Gordon was at the date of her marriage to Henry James Ross an infant. The usual proceedings to enable her to make a binding settlement on her marriage were instituted under the Infants' Settlement Act, 1856, and a settlement was in fact executed under an order made in those proceedings. The learned judge said that there was no need to refer to this settlement or its contents so far as the main question in the action was concerned.

At the date of the marriage it was admitted for the purposes of the action that Henry James Ross was domiciled in Egypt and had his residence in Alexandria. After the marriage was solemnized, Janet Anne Ross accompanied her husband Henry James Ross to Egypt, and lived with him in Alexandria. In 1862 the plaintiff was born. He was the only child of the marriage of his parents. In 1866 Henry James Ross and Janet Anne Ross left Alexandria and set up their home in Turin. In 1868 they moved again, and this time went to Florence, where they lived together until the death of Henry James Ross. In 1888 Henry James Ross purchased a mansion and estate near Settignano, Florence, known as Poggio Gherardo, and he and his wife lived there from the date of the purchase down to the year 1902, when Henry James Ross died. There could be no doubt that the domicil of Henry James Ross and his wife at that date was Italian. Henry James Ross, by his will, left all his property, including the mansion and estate near Florence, to his wife Janet Anne Ross. In due course she entered into possession of the property, and it was a fact that during her lifetime, no claim of any kind was made by the plaintiff to any interest in any part of that property.

After the death of Henry James Ross in 1902, Janet Anne Ross continued to reside at Poggio Gherardo until her death at Fiesole on August 23, 1927, being at the date of her death eighty-five years of age. Her testamentary dispositions were contained in four documents, a will in the English language with two codicils in the same language, and a will in the Italian language. The English will, which was dated July 6, 1910, was (inter alia) in the following terms: "I, Janet Anne Ross of Poggio Gherardo . . . . hereby declare this to be my last will . . . . which I make for the purpose of disposing of all my property which at the time of my death shall be actually in England and of all other my property wheresoever, except any property real or personal locally situate in Italy which may belong to me at my death, it being my intention to dispose of such my property in Italy by a separate testamentary disposition already made or hereafter to be made by me." The testatrix then appointed her niece Caroline Lucy Isabel Waterfield, the wife of Aubrey Waterfield, to be sole executrix of her will, and there was a provision, for the event (which did not happen) of the niece predeceasing the testatrix. Then followed certain bequests to servants, and there was a residuary devise and bequest in the following terms: "I devise and bequeath all the residue of my property (except property whether real or personal which shall be locally situate in Italy as aforesaid), to my niece Caroline Lucy Isabel Waterfield if living at my death for her own absolute use and benefit. But if she shall predecease me, then I devise and bequeath the same to my son Alexander Gordon Ross."

On July 22, 1921, the testatrix executed a first codicil to her will, and by it she gave certain legacies to her servants and others, and in all other respects confirmed her will. On May 1, 1924, she executed a second codicil to her will making thereby an alteration in the award of the legacy bequeathed to one of her servants, but otherwise leaving her will unaltered, except so far as provided by her first codicil. On May 23, 1924, Janet Anne Ross made a will in the Italian language. The agreed translation was in these terms: "I, the undersigned Janet Anne Ross, born Duff Gordon, residing in the afore-named locality"— that is Poggio Gherardo, near Settignano, Florence—" do by this my last will and testament appoint as heir to the whole of the property which I may possess in Italy at my death, movable as well as immovable, and in particular the villa and estate of Poggio Gherardo, ... to my grand-nephew Aymand Victor Arthur Waterfield, (a defendant in the action), and if he should predecease me, I appoint in his place his brother O. H. G. Waterfield. However I leave the usufruct of the said property, for the term of her natural life, to my niece Carolina Lucy Isabella Waterfield, the mother of my said heirs, and I also leave to her any jewellery, shawls, lace and wearing apparel. I appoint the advocate Alfredo Venturi as my testamentary executor." There were further directions for the payment of debts and certain legacies to servants.

The English will with its two codicils was duly proved by the defendant, Caroline Lucy Isabel Waterfield, on May 16, 1928. No question was raised as to the validity of the English will and the two codicils or any of them; nor was any question raised as to the validity of the Italian will, it being admitted that for the purposes of the action, this will conformed with the requirements of Italian law and was executed by Janet Anne Ross in the manner required by that law.

The testatrix left considerable property both in England and in Italy, the bulk of her property in Italy being the villa and estate known as Poggio Gherardo. As will have been noticed, neither by her English testamentary dispositions nor by her Italian will, did the testatrix, Janet Anne Ross, in the events which had happened, leave anything to her son, the plaintiff, for the defendant, Mrs. Waterfield, and her two sons both survived the testatrix. The plaintiff thereupon issued a writ dated May 17, 1928, and by his statement of claim (inter alia) sought the declaration set out above.

Alternatively the plaintiff alleged that if—contrary to his contention—Italian municipal law was not applicable, then Maltese law applied by virtue of the birth of his father, Henry James Ross having taken place in Malta, and by the marriage of his mother to his father in the year 1860. He therefore claimed that under the Maltese Ordinance No. VII. of 1868, arts. 313 and 314, he was entitled to one-third of the movable and immovable property of the testatrix situate in Italy, and to one-third of her movable property situate elsewhere than in Italy.

The defendants denied that Italian law applied and also refused to admit that Maltese law was applicable or that, if either did apply, the plaintiff was entitled to one moiety or to one-third of the estate of the testatrix; and they contended in the alternative, that if Italian law or Maltese law was applicable (which they denied), the plaintiff would have to bring into hotchpot, the property to which he was entitled under his mother's marriage settlement and certain payments made by the testatrix for the maintenance of the wife of the plaintiff.

Sir Gerald Hurst K.C. and *J. N. Gray* for the plaintiff. There can be no question that the testatrix Janet Anne Ross was at the date of her death domiciled in Italy. As her only child, the plaintiff is entitled to her movable and immovable property, as stated in the statement of claim. The law of the domicil governs the succession to movable property wherever situate, and therefore the testamentary dispositions of the testatrix so far as it affects her movable property is governed by Italian law. As regards the immovable property situate in Italy, that is in the same position as the movable property in Italy. It is submitted that the Court must apply the same law as the Italian Courts would apply to their own nationals, that is the municipal law of Italy. This question raises what is known as the doctrine of *renvoi*, which is not generally accepted by the Italian Courts.

The testatrix by establishing a domicil in Italy attracted to herself the law of Italy as regards her powers of testation; that is to say, the municipal law of Italy which would apply to Italian nationals: *Udny* v. *Udny* (1); *Bremer* v. *Freeman* (2); *Hamilton* v. *Dallas.* (3) The alternative view that the "law of Italy" means its whole law, including its rules of private international law whereby an Italian Court would refer the powers of the testatrix to the law of her nationality, would have the effect of (*a*) stultifying the English principle of looking to the law of the domicil, and (*b*) of forcing an illogically narrower construction on the phrase "law of the nationality" than on the phrase "law of the domicil," for if the latter includes its rules as to the conflict of laws, why should not the former?

There is, however, no justification for introducing this type of *renvoi* into English law: *In re Johnson* (4), a decision

(1) (1869) L. R. 1 H. L. Sc. 441, 452, 457, 458.

(2) (1857) 10 Moo. P. C. 306.

(3) (1875) 1 Ch. D. 257.

(4) [1903] 1 Ch. 821.

which it is submitted ought not to be followed. There the case for a Baden domicil was not argued, and the decision is not in accordance with the other authorities: see Pawley Bate on the Doctrine of *Renvoi*, 1904, p. 117*n*.

Renvoi is unnecessary if the true view is that English law means by "the law of the country of domicil," its internal law, that is, that law as it would apply to its own nationals: *Abd-ul-Messih* v. *Farra* (1), which on this point has not been criticized in *Casdagli* v. *Casdagli*. (2) The contention which we advance was argued in *In re Annesley* (3), and viewed with favour by Russell J. He calls it the "simple and rational solution."

Except for the passages in Dicey's Conflict of Laws, 4th ed., pp. 812, 816, 817, 820, 821 et seq., there is a strong bias of juristic opinion in favour of the plaintiff's contention: see Law Quarterly Review, vol. xxxvi., 1920, p. 91; and see generally Pawley Bate on the Doctrine of *Renvoi*, 1904, pp. 115 to 117; Law Quarterly Review, vol. xlii., 1926, p. 435. The American case of *In re Tallmadge* (4) is in point and was rightly decided on English principles: see also Baty's Polarized Law, 1914, pp. 115 et seq. on *Renvoi*.

The propositus attaches to himself the municipal law of the place where he lives, and it becomes his local law of succession. The distinction between municipal law and international law should be borne in mind: *The Zamora*. (5)

There are no clear decisions for the guidance of the Court whether the doctrine of *renvoi* has been accepted; it is an open question. The English Courts look to the law of domicil, the Italian Courts that of nationality; and there is no clear authority of the English Courts stultifying the primary principle of applying the internal law of England.

With regard to the alternative claim of the plaintiff, if we are wrong on the question of the application of Italian law, then we rely on the law of Malta. The Maltese Ordinance

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(1) (1888) 13 App. Cas. 431.

(2) [1919] A. C. 145.

(3) [1926] Ch. 692, 708, 709.

(4) (1919) 181 New York Supplement (215 New York State Reporter), 336; 36 Law Quarterly Review, 91; 43 Law Quarterly Review, 22.

(5) [1916] 2 A. C. 77, 91.

No. VII. of 1868, arts. 313 and 314, enables the plaintiff to claim one-third of the testatrix's movable and immovable property situate in Italy, and one-third of her movable property situate elsewhere.

Assuming that the internal law of the domicil does not govern the testamentary powers of the testatrix, the Court has to apply that of "nationality." A wife has now no "nationality" and no domicil apart from her husband: see the Naturalization Act, 1870. (1) Formerly she could have a different domicil from her husband: *A.-G. for Alberta* v. *Cook.* (2) If a husband becomes denaturalized, a wife would also lose her nationality. Here the husband's nationality was British, but it is that of a Briton whose birthplace and domicil of origin was Malta. Therefore the law of the nationality was Maltese and the widow became Maltese on her marriage, and her nationality never afterwards changed.

Further, if Italian municipal law applies on the evidence as to the hotchpot provisions in the settlement made on the marriage of the testatrix, this settlement is clearly outside the definition of gifts which a son is required to bring into hotchpot.

On the question of hotchpot, the law of Malta and Italy is the same; this latter law is applicable to Maltese law.

Lionel Cohen K.C. and *Wilfrid Hunt* for the defendants. The plaintiff's claim, it is submitted, cannot be successful. On the question of his right to a moiety of the testatrix's movable and immovable property situate in Italy and her movable property situate elsewhere than in Italy, the argument put forward on his behalf is, it is submitted, not enough to outweigh the clear principle which can be found running through all the decided cases on this particular point. The plaintiff has based his claim primarily on the remarks of Russell J. in *In re Annesley.* (3) It is submitted that it is impossible to treat this dictum of the learned judge as correct. It is not in accord with the decision in *In re Johnson* (4), and is in direct conflict with the previous current of authority, based as it is on one clear principle which runs through all the cases. The argument against the legality of the plaintiff's claim can be seen in the opinion put forward by eminent jurists: see Dicey's Conflict of Laws, 4th ed., p. 811, Note 1. All the cases are consistent with the view of the author therein expressed.

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(1) 33 Vict. c. 14, s. 10, sub-s. 1.

(2) [1926] A. C. 444, 460, 465.

(3) [1926] Ch. 692, 708, 709.

(4) [1903] 1 Ch. 821.

Here it is submitted that what an English Court has to do is—in the case of a testatrix admittedly domiciled in Italy—to decide the case in the same way as an Italian Court if dealing with the same case would decide it. The note in Halsbury on the Laws of England, vol. vi., para. 335, pp. 222, 223, n. (*r*), is relied on; there the question of how the doctrine of *renvoi* is dealt with is considered, and in our contention the views therein considered are correct. The evidence here is conclusive that Italian law would apply English law to the case of the plaintiff, and therefore he is not entitled to his *legitima portio* under Italian law: see further Bentwich on Domicil and Succession, 1911, p. 135; and Westlake on Private International Law, 7th ed., pp. 29, 35. The text-books are uniform and support the view that you have to look at the whole law, that is the law of the domicil: see also Dicey on the Law of Domicil, 1879, pp. 85, 296.

The cases seem to adopt the principle put forward by the defendants: see the early cases, *De Bonneval* v. *De Bonneval* (1); *Collier* v. *Rivaz* (2), and the earlier cases set out in Westlake on Private International Law, 7th ed., p. 121, §§ 83, 84, which are consistent with our contention: see also *Bremer* v. *Freeman* (3), referred to in Bentwich on Domicil and Succession, 1911, p. 167; also *In re Trufort* (4); and *Casdagli* v. *Casdagli* (5), for the dissenting judgment of Scrutton L.J. on the law of domicil, and the same case in the Court of Appeal. (5) The dictum of Russell J. in *In re Annesley* (6) cannot be supported, and is not substantiated

(1) (1838) 1 Curt. 856.

(2) (1841) 2 Curt. 855, 861.

(3) 10 Moo. P. C. 306, 312, 359, 373.

(4) (1887) 36 Ch. D. 600, 602, 609, 612, 618.

(5) [1918] P. 89, 106, 116, 117, 119; [1919] A. C. 145, 169, 175, 191, 202.

(6) [1926] Ch. 692, 708, 709.

by any of the previously decided cases. *In re Johnson* (1) is relied on: see the remarks of Farwell J. The domicil of origin of the testatrix is English, she was a British subject, and on this point English law applies: see also *In re Johnson.* (1) She only changed her domicil on marriage: see on this point Dicey's Conflict of Laws, 4th ed., pp. 126, 127; and Foote on Private International Law, 5th ed., pp. 87, 88.

The question has also been raised whether English or some other system of law enforceable in the British Empire can be applied. The plaintiff has argued that Maltese law might be applied, because that law was the law in force in the place where the husband of the testatrix had his domicil of origin. During the marriage neither the testatrix nor her husband had been domiciled in Malta, and although during her husband's lifetime the testatrix could not have obtained a domicil different from that of her husband, she was free to do so after his death. Had she, for instance, removed her home to Germany with the intention of making it her permanent home, there would be no question but that she would have obtained a German domicil and died domiciled in Germany. In these circumstances if it was necessary to fix her domicil artificially, for instance a domicil of origin, it is that and not her late husband's which counts, and it is of course admitted that her domicil of origin was English: see Dicey's Conflict of Laws, 4th ed., pp. 125, 126, 127.

Sir Gerald Hurst K.C. in reply. The plaintiff is entitled to succeed. The American case of *In re Tallmadge* (2) is relied on: and see Baty's Polarized Law, 1914, p. 116. Our contention would avoid the *renvoi.* It is submitted the Court ought not to adopt the narrow construction: see Pawley Bate on the Doctrine of *Renvoi*, 1904, pp. 110, 114, for his criticism on *Collier* v. *Rivaz.* (3) There is really no clear line of authority, but see *Anstruther* v. *Chalmer* (4) as to the view the Court then took of domicil.

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(1) [1903] 1 Ch. 821, 828, 831, 832.

(2) 181 New York Supplement (215 New York State Reporter), 336.

(3) 2 Curt. 855.

(4) (1825) 2 Sim. 1.

As regards the defendant's contention on the question of the Maltese domicil, it is submitted that to look at the domicil of origin is wrong. As to a wife's domicil being that of her husband, see Lord Merrivale in *A.-G. of Alberta* v. *Cook.* (1)

Cur. adv. vult.

Nov. 14. LUXMOORE J. The plaintiff in this action seeks a declaration that he is entitled, notwithstanding the testamentary dispositions made by his mother, Mrs. Janet Anne Ross, to one moiety of her movable and immovable property situate in Italy, and to one moiety of her movable property situate elsewhere than in Italy. There is an alternative claim to one-third of the same property. These claims are made in the following circumstances. [His Lordship read the facts as substantially set out above.]

The plaintiff's claim is that notwithstanding the testamentary dispositions of his mother, Janet Anne Ross, he became entitled on her death as her only child to one moiety of her immovable property situate in Italy, and to one moiety of her movable property, whether situate in Italy or elsewhere, on the ground that this moiety constitutes his *legitima portio* under the Italian law. No distinction was in fact drawn in the argument between the movable and immovable property in Italy. It may well be that in the result each class of property devolves in the same way, yet logically I think the two classes should be dealt with separately, and this I propose to do. There can be no room for doubt on the evidence as to the domicil of Janet Anne Ross at the date of her death, and I have no difficulty in holding that her domicil was Italian. Indeed I do not think that there was any dispute between the parties on this head.

I will deal first with the movable property. Both the plaintiff's and defendants' counsel agree that by English law, the succession to movable property wherever situate is governed by the law of the domicil, in this case the law of Italy. In Italy, as in most of the European countries, the law refuses to recognize domicil as governing succession and

(1) 1926] A. C. 444, 460.

other personal rights, and accepts the law of the nationality as the governing law. The material sections of the Italian Code are arts. 6, 8 and 9 of the Preliminary Title. These articles so far as material to the present case provide as follows: (I am reading from the agreed translation) "Article 6. The status and capacity of persons and the family relations are regulated by the law of the nation to which they belong."

Art. 8: "Succession, either under an intestacy or under a will, whether as regards the order of succession or the measure of the rights of succession, or the intrinsic validity of the testamentary disposition, is regulated by the national law of the person whose estate is in question, and this whatever may be the nature of the property or the country in which it is situate." Art. 9, para. 2, says: "The substance and effect" —I am reading it shortly, so far as it is material to this case— "of . . . . testamentary dispositions are deemed to be governed by the national law of the . . . . testator." As I have already stated, the parties are agreed that "the law of the domicil," governs the succession to the movable property. The dispute which arises between them and which I have to determine, is what is meant by "the law of the domicil." Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicil (sometimes called "the municipal law," or "the internal law"); or does it mean the whole law of the country of domicil, including the rules of private international law, administered by its tribunals? If the former contention is correct, then the English Court, in deciding a case like the present, is not concerned to inquire what the Courts of the country of domicil would in fact decide in the particular case, but what the Courts of the domicil would decide if the propositus, instead of being domiciled in the foreign country, was also a national of that country. Whereas if the latter view is the correct one, the English Court is solely concerned to inquire what the Courts of the country of domicil would in fact decide in the particular case. In my opinion the latter is the correct view, as laid down by the English decisions, and there is no decision that has been quoted to me in argument or that I have been able to discover which supports the former view, though there is a dictum in the most recent case dealing with the question, which expresses approval of that view. I refer to the dictum of Russell J. in *In re Annesley.* (1) I will deal with this case and the dictum in it, later.

The argument against the view that the law of the country of domicil, means the whole of the law of that country, including its rules of private international law, is based on a claim that if this be the meaning of the expression "the law of the domicil," then logically the meaning of the expression "the law of the nationality" must also mean the whole of that law, including its rules of private international law; and it is said that if this be the true rule, the English Court, in effect, has to say—I am putting the argument in the concrete form applicable to the case before me—the Italian law provides that the law of the nationality (the English law) is to be the governing law on the basis that the domicil of origin is English; but as the English law considers the law of the domicil to be the governing law, there is a further reference back from it to the Italian law as the domiciliary law, the logical result being an endless oscillation backwards and forwards from one law to the other, the English Court sending the case back according to the English doctrine of domicil to the Italian Court, and the Italian Court sending it back again to the English Court according to the Italian doctrine of nationality, and so on ad infinitum; the result being the establishment of what has been called by some of the text writers a "circulus inextricabilis." The circle can only be cut if and when one or other of the opposing systems of law—to use once more a phrase adopted by the text writers—"accepts the *renvoi*."

Is this argument well founded? Indeed, does it arise at all? It does not in fact arise if the true view of the English Court is that, by the phrase "the law of the country of domicil" is meant that law which the Courts of the country of domicil apply to the decision of the case to which the rule refers.

(1) [1926] Ch. 692, 708, 709.

If this is the correct view, the English Courts in deciding the case "accept the *renvoi*." Let me illustrate what I mean by a reference to the question before me. It is admitted on both sides that the English Court must adhere to the rule that, Janet Anne Ross having died domiciled in Italy, the distribution of her movable property must be governed by the law of Italy. On the proposition with which I am dealing, this means the law which the Italian Courts would hold to be applicable to the case of Janet Anne Ross, she being a British subject with an English domicil of origin. If because of her nationality the Italian Courts hold that her movable property ought to be distributed in accordance with English internal law as applicable to English nationals domiciled in England—then the English Courts will distribute this property in exactly the same way as if Janet Anne Ross was in fact at her death domiciled in England. If, on the other hand, the Italian Courts should hold that her movable property should be distributed in accordance with the internal law of Italy applicable to Italian nationals, then the English Courts will distribute Janet Anne Ross's movable property in accordance with Italian internal law. In other words, the English Court will endeavour to ascertain what the Italian Courts would in fact decide with regard to that part of Janet Anne Ross's movable property as might come under the actual control of the Italian Courts.

My attention has been called in the course of the argument of this case to a number of authorities, and I have also considered a number of other decisions. In my view the general trend of the authorities establishes that the English Courts have generally, if not invariably, meant by "the law of the country of domicil," the whole law of that country as administered by the Courts of that country, and with the exception of the dictum already referred to, there is no case to the contrary.

The earliest case in the books is *Collier* v. *Rivaz*. (1) One Ryan, a British subject, died domiciled in Belgium. He left certain testamentary papers executed in accordance with the formalities required by English law but not in accordance with those required by Belgian local law. It was proved by the necessary expert evidence that the Belgian Courts if called on to decide the question of validity would uphold the testamentary documents on the ground that they were valid according to the testator's national law, and Sir Herbert Jenner in his judgment said this: "The question however remains to be determined, whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow, that Mr. Ryan, being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subject of another country; and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case."

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(1) 2 Curt. 855, 858.

The whole basis of his decision is that the Court sitting in this country to determine the question must consider itself sitting in Belgium, that is, the Court is only concerned to see what view the Belgian Court would take of the English law; and it was never suggested that it was the duty of the English Court to consider what its own view of the English law ought to be. The result in *Collier* v. *Rivaz* (1) could not have been arrived at if the English Court had refused to take into account the rules of private international law applied by and recognized in the Belgian Courts, and had merely applied the ordinary local law of Belgium applicable to Belgian nationals.

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(1) 2 Curt. 855, 858.

In *Maltass* v. *Maltass* (1) the question arose as to the validity of a will made by a British subject resident in Turkey. The will was in the form required by English internal law. The question of what was the testator's domicil at his death was debated, but the Court did not think it necessary to decide the question, and Dr. Lushington, sitting for Sir Herbert Jenner, said: "But this inquiry (that is the inquiry as to domicil) will become unnecessary if it should turn out that, with respect to this individual succession, the law of Great Britain and of Turkey is the same; for when we speak of the law of domicil as applied to the law of succession, we mean, not the general law, but the law which the country of domicil applies to the particular case under consideration. Such law may be totally different as applied to a natural born subject of the country, as exemplified in the case of *Collier* v. *Rivaz.* (2) There the testator died domiciled in Belgium; but, by the Belgian law, the succession in that case was not to be governed by the law of Belgium, applicable to natural born subjects, but by the law of that country, applicable to an English born subject dying domiciled in Belgium."

I refer to this case for the dictum I have just read, for the actual decision turned on the applicability of certain treaties existing between the United Kingdom and Turkey, and there is no decision relating to any question of *renvoi.*

In *Frere* v. *Frere* (3) Sir Herbert Jenner Fust in the Prerogative Court of Canterbury declined to declare void the will of the Right Honourable J. Hookham Frere, who at the date of his will and death was domiciled in Malta, the will having been made in England in English form, and not in accordance with the requirements of the local Maltese law. The basis of the decision was that on the evidence before the Court there was nothing to show that the Maltese Courts would deem a will made outside Malta by a person domiciled in Malta to be void if it complied with the formal requirements of the lex actus.

(1) (1844) 1 Robertson, 67, 72.
(2) 2 Curt 855, 858.
(3) (1847) 5 Notes of Cases, 593.

In *Bremer* v. *Freeman* (1) a British subject died domiciled de facto in France. She had made a will in France in English form; the will dealt with movables the bulk of which were situate in England. The testatrix had not obtained from the French Government an authorization to acquire a French domicil. Sir John Dodson admitted the will to probate on the ground that, though the testatrix had her domicil de facto in France, yet that it was necessary in order to establish a domicil in France, so as to affect her succession and the mode of making her will, that her domicil should be by authorization of the French Government. The judge, Sir John Dodson, expressly said he was following *Collier* v. *Rivaz.* (2) The decision was reversed in the Privy Council. The judgment was delivered by Lord Wensleydale, and he said in the course of his judgment that there were two questions before the Court. The first related to domicil, and the second was: Has it been established that by the municipal law of the domicil at the time of death, the will propounded was valid? On the first question it was held that the testatrix was domiciled de facto in France, although there had been no authorization by the French Government, and consequently, the second question was whether in the case of a person domiciled de facto in France, the use of the English form was sanctioned by the municipal law of France. The keystone of the judgment of Lord Wensleydale is that the testatrix having died domiciled de facto in France, the validity of her will is to be determined by French law. The judgment deals with two alternative interpretations of art. 13 of the Code Napoléon, on which the first question arose. The first interpretation dealt with was that the French law refuses civil rights, including the right of testamentary disposition, to one who is domiciled but has not an authorization. On this interpretation Lord Wensleydale said two cases must be considered: (*a*) Suppose the refusal applies to goods wherever situate. In this case the testatrix loses, by the French law of her domicil, power to make a will altogether, and the will propounded is invalid; and (*b*) Suppose

(1) 10 Moo. P. C. 306, 359, 373. (2) 2 Curt. 855.

this refusal applies only to goods situate in France. Still, the will to have any effect, must be in the form and with the solemnities of the domicil according to the general rule, otherwise it cannot be admitted to proof. The second interpretation dealt with was: Does art. 13 of the Code Napoléon mean that French law insists that no domicil for any purpose whatever can be obtained without authorization? Lord Wensleydale came to the following conclusion, after considering French cases and the opinions of French writers. I quote from his judgment where he says this: "On the whole, then, on a review of all this evidence of the law of France, their Lordships are clearly of opinion, that it is not established, that for the purpose of having a domicile which would regulate the succession, any authorization of the Emperor was necessary; that a legal domicile for this purpose was clearly proved, and that consequently, if the testatrix had a power to make a will at all, the will in this form was invalid." The decision involves the acceptance of the fact that the French law had rules of succession for a foreigner who was domiciled in France without authorization, and dealt with the case as it concluded the French Courts would have decided the matter. I have referred to this case at length, because it is claimed by Sir Gerald Hurst on behalf of the plaintiff that it supports his argument that the English Court ought to decide the question as to what is meant by the law of the country of domicil as limited to the local law of that country applicable to its own nationals resident there. In my view, for the reasons stated in my consideration of it, the case of *Bremer* v. *Freeman* (1), that case does not support Sir Gerald Hurst's argument, but is, in fact, opposed to it, for the basis of the decision is the finding of the Court as to the law which the French Courts would have held to be applicable.

The case of *Hamilton* v. *Dallas* (2) was also relied on by Sir Gerald Hurst. In my view, its effect is, for all practical purposes, the same as the decision in *Bremer* v. *Freeman*. (1) The question was as to the succession upon an intestacy of an Englishman domiciled in France de facto and without the official authorization required by the Code. Bacon V.-C. held that the deceased was in the circumstances of that case capable by French law of acquiring a domicil for civil purposes in France, and that his succession was governed by the French law. In this case, as well as in the case of *Bremer* v. *Freeman* (1), no question of *renvoi* arose. The Court acted on the rule that the whole law of the foreign country was to be considered when a question of succession was referred to that law, and pronounced judgment on the footing of the conclusion to which the Court held the French law would, in fact, have arrived. In *In the Goods of Luigi Bianchi (deceased)* (2) the question again related to succession. The testator was born at Genoa, which then formed part of the Kingdom of Sardinia. He went to Brazil early in life, and after having acquired a fortune, he decided to leave Brazil and return permanently to Genoa. He died on his way home without having made any testamentary disposition of his property. Some of his children resided in Brazil and others in Genoa. Among other property he possessed movable property in England. In 1859 the Probate Court in England made a grant of administration to the representative of a person who had been appointed by the Brazilian Court as the guardian. Discussions arose between the Brazilian and Sardinian Governments with regard to the testator's domicil at the date of his death, and in the result, the Brazilian Government withdrew all claims to administration and guardianship. In 1862 an application was made to the Court of Probate in this country to rescind the former grant in favour of the representative of the Brazilian guardian, and to make a new grant in favour of the Sardinian consul at Bahia. Sir Charles Cresswell refused to pay any regard to the arrangement between the two Governments, and ultimately rescinded the grant on the ground that as the testator had finally abandoned his acquired domicil in Brazil, the domicil of origin revived, and the Court therefore had to deal with the case according to the Sardinian law. In *In the Goods of Lacroix* (1) Sir John Hannen granted probate to the will of an Englishman presumably domiciled in France. The will was made in France in English form, and not in a form allowed by the internal French law as applicable to French nationals. The grant was made ex parte, and on evidence by affidavit that by French law the will of a British subject made in France would be valid if it was in the form required by the law of England to give validity to wills executed by Englishmen in England. The basis of this decision is the interpretation by the Court of the provision in Lord Kingsdown's Act (2), that a will is valid in England if "made according to the forms required by the law of the place where the same was made," as referring to "the law which the Courts of the locus actus would deem applicable in the given case."

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(1) 10 Moo. P. C. 306.

(2) 1 Ch. D. 257.

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(1) 10 Moo. P. C. 306.

(2) (1862) 3 Sw. & Tr. 16.

In *In re Trufort* (3) the question arose with regard to the succession to the property of a Swiss national who had died domiciled in France. The plaintiff instituted proceedings in the Swiss Court, claiming that he was the legitimate son of the propositus and to be entitled, notwithstanding his testamentary dispositions, to the bulk of his estate. The Swiss Courts decided in the plaintiff's favour. Proceedings were commenced in England for the enforcement of the Swiss judgment and for a declaration that the estate of the propositus ought to be administered according to the law of France. Stirling J. declared that he was bound by the decisions of the Swiss Courts. After quoting from such well known cases as *Enohin* v. *Wylie* (4); *Ewing* v. *Orr-Ewing* (5); and *Doglioni* v. *Crispin* (6), Stirling J. said this: "The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such

(1) (1877) 2 P. D. 94, 96.

(2) Wills Act, 1861 (24 & 25 Vict. c. 114).

(3) 36 Ch. D. 600, 611, 612.

(4) (1862) 10 H. L. C. 1, 13.

(5) (1885) 10 App. Cas. 453, 502.

(6) (1866) L. R. 1 H. L. 301, 314.

case may be bound to ascertain as best they can who according to the law of the domicil, are entitled to that estate, yet where the title has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon, and must be followed by the Courts of this country. It is contended that this rule applies to the present case. It is, indeed, admitted that the domicil of the testator was French, but according to the law of France (as stated by the defendant's own witnesses) the right to his succession depends on his nationality. That nationality it is said was Swiss, and by virtue of the treaty between France and Switzerland in 1869 the right of succession falls to be determined by the tribunals of Zurich, who have decided in favour of the plaintiff. It is obvious that this argument cannot prevail unless the testator's nationality was Swiss, and this is a point which at the trial was made the subject of considerable argument and which demands close examination." The learned judge drew certain conclusions from the evidence, and held that the plaintiff's father (the testator) was at the time of his death a Swiss, and not a British subject, and continued: "The testator's nationality then being Swiss at the time of his death, it follows that the Zurich tribunals are those which according to the law of the testator's domicil have jurisdiction to decide on the right of succession to his estate, and in fact they have at the instance of the defendant been recognised as such by the Court of St. Julien. This being so, I have an advantage similar to that which the Court had in *Doglioni* v. *Crispin* (1), that the claim of the party litigating in this Court has been actually raised and decided in the Courts which according to the law of the testator's domicil were the proper and competent tribunals to decide on their rights. Those tribunals have decided that the plaintiff is entitled to nine-tenths of the testator's personal estate, of which the funds which form the subject-matter of the present action are part, and in accordance with the principle laid down in *Doglioni* v. *Crispin* (1), I consider that I am bound by their decision."

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(1) L. R. 1 H. L. 301, 314.

In *Abd-ul-Messih* v. *Farra* (1) the question to be determined was with regard to the succession to the movable property of a testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, but who had at the date of his death acquired a permanent residence in Cairo and the status of a protected British subject. It was held in the Privy Council that the testator died domiciled in the dominions of the Porte, and that a Consular Court at Constantinople, being bound by a particular Order in Council to follow the same principles which would have been observed by an English Court of Probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community, domiciled in Turkey, be followed in considering the power of testacy of the deceased, and in distributing his effects. So far as the actual decision is concerned no question of *renvoi* arose, but Lord Watson, who delivered the judgment of the Privy Council, indicated how the case would have been dealt with if it had been a case of *renvoi*. The relevant passage is where Lord Watson says this: "The next alternative presented by the appellant's counsel was this, that her husband had de facto, or at all events according to Ottoman law, lost his Turkish nationality, and had become a subject of the Queen. That change in his political status was said to be attended with one or other of these consequences, viz., either that his civil status became that of a domiciled Englishman; or, assuming his domicil to have been in Bagdad, that a Turkish tribunal would, in administering his estate, defer to the law of England, as the law of his nationality." Then later he goes on to say: "If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicil would still be applicable to his capacity to make a will, and to the distribution of his estate." I refer to this case because it was relied on by Sir Gerald Hurst as supporting his argument. In my view this reliance is not well founded. The dictum is purely neutral, because the phrase, "the territorial law of his domicil," is, I think, used in an ambiguous sense, and not in the narrower sense of the law of the country of domicil applicable to the nationals of such country.

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(1) 13 App. Cas. 431, 443, 444.

In re Johnson (1) is the first case in which the word *renvoi* appears to have been used. The facts are shortly as follows: In 1894 a British subject (one Mary Elizabeth Johnson), whose domicil of origin was Maltese, died intestate and domiciled in Baden. She was not naturalized there, and the evidence in the case established that by the law of Baden, the succession to her property was governed by the law of her nationality. She left movable property in England and Baden. Farwell J. directed the movables in England to be distributed according to Maltese law. The decision was based on two alternative grounds: First, that it is impossible according to English law for a person to acquire a domicil of choice in a foreign country unless that person has also acquired a domicil there according to the law of the foreign country; therefore, in the particular case, as the law of Baden refused to recognize domicil as having any legal effect on the status of Mary Elizabeth Johnson, the succession to her movable property must be determined according to the law of her domicil of origin, that is, Maltese law. This view of the English law as to domicil is not consistent with other decisions, and Russell J. refused to follow it in *In re Annesley.* (2) The second ground of the decision is based on the assumption that Mary Elizabeth Johnson was at her death domiciled in Baden, and that the law of Baden governed the succession to her movable property. It was found by the certificate which was binding on the parties in the case, that, according to the law of Baden, the legal succession to that part of her property which she had not disposed of by her will, was governed by the law of the country of which she was a subject at the time of her death. In the course of his judgment the learned judge says this: "It is not for me to say how the Baden Courts would interpret their rule of distributing according to nationality." I think that means that the interpretation of the Baden law is a matter for the Baden Court; and he goes on to say: "It was urged in argument that the finding in the certificate is that, according to the law of Baden, movables are to be distributed according to the nationality of the propositus. I have already given my reasons for holding that the Baden Courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden Courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or, in other words, of which he is a subject." On this second ground the decision is in accordance with the view expressed in *Collier* v. *Rivaz* (1), and the other cases I have already referred to, that is, that the law of the country of domicil is the law as it would be decided by the Courts of that country in reference to the facts of the particular case to be considered.

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(1) [1903] 1 Ch. 821, 830, 832.

(2) [1926] Ch. 692.

The latest reported case dealing with the question is *In re Annesley* (2), to which I have already referred. There, Russell J., after fully discussing the decision in *In re Johnson* (3), refused to follow it, so far as the question of domicil was concerned, and held that the deceased in the case before him had acquired a domicil de facto in France by long continued residence, coupled with the intention of indefinite residence, and overruled objections based on a clause in the deceased's will which declared she had never intended to abandon her English domicil, and had never applied under art. 13 of the Civil Code or otherwise to fix her domicil in France, or for naturalization. In addition to this, the learned judge, after examining the evidence as to French law, concluded that the proper view was that the French law would accept *renvoi* from the English law, and apply the local law of France to the deceased's testamentary dispositions, and following this he decided that the deceased only had power to dispose, by these testamentary dispositions, of one-third of her English personal property, and her French movable property. I should state that the will, and a codicil to it, were both made in English form, and were valid under the Wills Act, 1861. So far the actual decision as to the law applicable is in accord with the other authorities to which I have referred, for the learned judge held in fact that the law applicable was the law as it would have been determined by the French Courts. In other words the learned judge placed himself in the position of the French Court in considering and determining the question. In the course of his judgment he said this: "In these circumstances, and after careful consideration of the evidence of the experts called before me, I have come to the conclusion that I ought to accept the view that according to French law the French Courts, in administering the movable property of a deceased foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with art. 13 of the Code." He, however, expressed his personal opinion that the doctrine of the *renvoi* should be entirely avoided. Further he said this: "Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country, shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York "—and he refers to the case of *In re Tallmadge.* (1) With all respect to the learned judge, I do not think his expression of opinion—no matter how convenient such a course might be (and as to that I express no personal view)—is in fact in accord with the cases to which I have referred, while his actual decision, so far as the *renvoi* doctrine is concerned, in fact accords with them.

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(1) 2 Curt. 855.
(2) [1926] Ch. 692, 708.
(3) [1903] 1 Ch. 821.

In this connection I would like to refer to the dictum of Scrutton L.J. in *Casdagli* v. *Casdagli* (2), where he says: " Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of domicil looks to or sends back (*renvoyer*) the decision to the law of nationality, there is an inextricable circle in ' the doctrine of the *renvoi* ' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says, ' We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.' " This dictum, in effect, approves of the decision of such matters in accordance with the law as interpreted and administered by the Courts of the country of domicil.

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(1) New York Law Journal, Oct. 17, 1919; 181 New York Supplement (215 New York State Reporter), 336.

(2) [1918] P. 89, 111.

I have I think now dealt with all the relevant cases. In addition to them my attention has been called to a number of articles by international jurists. There is an acute conflict between the various authors on the question, and so far as the English writers are concerned, they seem to be fairly equally divided. I should also add that in the course of the argument my attention was called to the report of the American case referred to by Russell J. in his judgment in *In re Annesley* (1)—namely, the case of *In re Tallmadge. In re Chadwick's Will.* (2) The decision is that of the Surrogates Court, New York County. The judge of that Court goes through most of the authorities to which I have referred, and comes to a conclusion opposite to that at which I have arrived. For the reasons I have endeavoured to express in this judgment, I think his decision is not in accord with the English authorities.

In my opinion the present case must be decided in accordance with the law of Italy, as that law would be expounded in the Italian Courts. If the Italian Court had in fact dealt with the matter there would be no necessity to inquire into the law, and it would be my duty simply to follow the decision. Since there is no decision by the Italian Court, I am bound to ascertain how the Italian Court would decide the case from the evidence of those competent to instruct me. I am glad to say that the Italian lawyers who have been called on both sides are unanimous in this conclusion, that if the case fell to be decided in the Italian Courts, it would be held that the testamentary dispositions of Mrs. Janet Anne Ross were valid, and provide for the total disposition of her property in Italy; and that in no circumstances would the Italian Court recognize any right on the part of the plaintiff to any part of her property as *legitima portio*, as it would have done had Mrs. Janet Anne Ross been an Italian national. Dr. Giuseppe Pallicia, who gave evidence on behalf of the plaintiff, said that if the present case fell to be decided in Italy, there is no doubt but that the Italian Court would apply the English law applicable to Mrs. Janet Anne Ross as a British subject, without any reference to the fact that she was domiciled in Italy; and the most he would say in favour of the plaintiff's claim was that, if the Court in England should hold that he was entitled, notwithstanding his mother's testamentary dispositions, to the *legitima portio*, he would have been entitled to if she were in fact an Italian national; the Italian Courts would recognize that decision and enforce it, unless it was against public policy. His answer to the question whether such a decision would be against public policy was a little ambiguous, but I think he really expressed the view that the sounder opinion is that the answer would be in the affirmative. On the other hand, both Dr. Adrian Dingli and Dr. Ferdinando Bosi are unanimous in the view that the Italian Courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England; and that if the English Court decided the case in any other manner, the Italian Court would refuse to follow such a decision and dispose of the case as if it came before the Italian Court untrammelled by any English decisions. I accept their evidence on the Italian law.

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(1) [1926] Ch. 692, 709.

(2) 181 New York Supplement (215 New York State Reporter), 336.

This disposes of the case so far as the movables in Italy are concerned. The position as to the immovable property in Italy seems to me to stand on a different basis. It is true that the law of Italy provides, by arts. 8 and 9 of the Code (which I have already read), that the succession to movable and immovable property is governed by the law of the nationality of the deceased owner, yet the English law has never suggested that the law of the domicil has anything to do with the succession to immovables. On the contrary it has always recognized that the lex situs governs the succession to immovables, and the lex situs must necessarily be the law of the country where the property is situate, as it would be expounded by the Courts of that country; and domicil cannot under any circumstances have any bearing on the case. But to some extent the theory of the *renvoi* may apply, for the law of England refers the question of succession to immovables to the lex situs (in this case the law of Italy), and the lex situs (the Italian law) refers the case to the law of the nationality, and this might mean the law of the nationality including the rule relating to the lex situs, and once again the circulus inextricabis would be constituted. But in my view the lex situs must, for the reasons I have already stated with regard to the meaning to be placed on the phrase, "law of the domicil," be construed in the way the Courts of the country where the immovables are situate would themselves determine. On this basis the expert evidence is clear that the Italian Courts would decide the succession to the immovable property in the same manner as the English Court would determine it if the immovable property in question belonged to an Englishman and was situate in England.

I have in effect now disposed of the whole action, but since the case may go elsewhere, it is necessary for me to deal with certain other points raised. So far as the alternative claim is concerned, that is, to the one-third of the movable and immovable property in Italy and of the movable property situate elsewhere than in Italy, it is argued that if Italian local law is not applicable to the succession, then the law of Malta is the appropriate law, because Henry James Ross was of British nationality by reason of his birth in Malta, itself a part of the British Empire, and he was for the same reason subject to Maltese law. It is further argued that on her marriage to Henry James Ross, Mrs. Janet Anne Ross, although already a British subject, with an English domicil of origin, and so subject to English law, changed her position and became subject to Maltese law, because by her marriage she acquired the nationality and domicil of her husband. This argument is, I think, quite untenable. Both Henry James Ross and Janet Anne Ross were British nationals. The English law recognizes a domicil of choice and the right to abandon such domicil. If in fact a domicil of choice is abandoned, the domicil of origin revives. This applies equally to a man or a woman, and so, although on her marriage Mrs. Janet Anne Ross acquired her husband's domicil and changed it from time to time as and when he changed his, yet on his death she acquired her own domicil, and if she, being a widow, had abandoned her domicil of choice in Italy, there can be no doubt that her own English domicil of origin would have revived: see Dicey's Conflict of Laws, 4th ed., pp. 126, 127. Consequently, if the law of her nationality is to be applied, such law must be such part of the British law as is applicable to her domicil of origin—namely, England.

A further question was argued on the assumption that the local law of Italy as applicable to an Italian national governed the case—namely, that the plaintiff could only claim his *legitima portio* subject to his bringing into hotchpot the benefits which came to him from his mother under the settlement made on her marriage, and also some small sums paid by Mrs. Janet Anne Ross to the Marylebone Board of Guardians for the support and maintenance of the plaintiff's wife while she was in this country. There was some divergence between the experts as to Italian law on this point, but I am satisfied by the evidence that the better view is that the benefits under the marriage settlement would have to be brought into hotchpot under Italian law, and I so hold. The position with regard to the payments made for the maintenance of the plaintiff's wife stand on a different footing, and I do not think these are within the hotchpot provisions of the Italian law. The same questions as to hotchpot are raised in the event of the Maltese law being applicable. On the evidence before me, the Maltese law and Italian law appear to be identical on these points, and my decision as to the Italian law will therefore apply if, contrary to my judgment, it should be held that the Maltese law is applicable.

In the result the plaintiff has failed to substantiate either of his claims in this action, and I therefore dismiss it with costs.

Solicitors: *Holloway, Blount & Duke; Stephenson, Harwood & Tatham.*

A. R. T.

In re ANZIANI.

HERBERT *v.* CHRISTOPHERSON.

[1929. A. 1101.]

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July 17, 24, 25.

Conflict of Laws—Foreign Subject—Document executed Abroad—Property in United Kingdom—Administration—Testamentary Document—Conveyance inter vivos.

An assignment, executed in a foreign jurisdiction by a person there domiciled, of a chose in action locally situate (so far as a chose in action can be) in England, is void if the assignment is void on grounds of substance according to the local law.

A document executed abroad in exercise of powers of appointment conferred by settlements executed in accordance with English law, and expressed to be intended to operate both as an assignment and as a will, may take effect as a conveyance inter vivos of the property of the person executing it.

Upon the marriage of the testatrix, who was born in Italy, to an Italian, two settlements of property belonging to her, hereinafter respectively called the "A" settlement and the "B" settlement, were executed. The "A" settlement comprised proceeds of sale of English freeholds conveyed to the settlement trustees on trust for sale, and investments and other moneys, the whole fund being settled on trust to pay to the husband during the joint lives of himself and the testatrix, 500*l.* a year, and subject thereto to pay the annual income to the testatrix for life without power of anticipation, and, after her death, to raise 50,000*l.*, as she should by deed or will appoint and pay the sum so raised to such persons as she should appoint. The "B" settlement comprised certain freeholds and certain moneys which were settled on trust to pay the income to the testatrix for life, and after her death as she should appoint. Both were English in language and form and the trustees were resident in the United Kingdom. By a deed of December 10, 1906, to which her husband and the trustees of the "A" settlement were parties, the testatrix appointed that the residue of the 50,000*l.* which she then had power to appoint under the "A" settlement should be charged upon and raised out of the property subject to that settlement, and, after her death, should be held in trust for her absolutely as her separate estate. By a deed of May 23, 1912, between herself, her husband, and the "B" settlement trustees, the testatrix appointed that, after her death, and, until then, subject to her life interest, the property comprised in the "B" settlement should be held by the trustees upon trust to pay sums which she or her husband should become liable to pay to them under certain covenants of indemnity in the deed, and, subject thereto in trust for the testatrix, her heirs, administrators and assigns. The testatrix and her husband lived in Italy, and she was domiciled there at the date of her death. On July 28, 1927, being then domiciled in Italy, she executed an "appointment

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and assignment," expressed to be supplemental to the "A" settlement, the "B" settlement, and the deed of December 10, 1906, and expressed also to be intended to operate as an assignment inter vivos and as a will. By it, she appointed and assigned the property comprised in those documents (subject to certain subsisting trusts) to the trustees of the appointment and assignment whom she appointed executors upon trust for the payment of certain debts and legacies, and she gave the final residue to one of the trustees absolutely. After the death of the testatrix leaving no other testamentary disposition, the deed of appointment and assignment was admitted to probate in the United Kingdom :—

Held, (i.) following *Republica de Guatemala* v. *Nunez* [1927] 1 K. B. 669, that the deed of appointment and assignment so far as it purported to assign movable property was subject to the law of the country in which it had been executed and in which the testatrix was domiciled, i.e., to Italian law, and that, being null and void in Italian law, it did not effectually assign the remainder of the 50,000*l.* appointed by the deed of December 10, 1906 :

(ii.) That the appointees of the sum of 50,000*l.* were not persons entitled to immovable property. Their right, which was to require the trustees to pay the amount, was a chose in action in the nature of a movable :

(iii.) That the deed of appointment and assignment, as it was expressed to be intended to operate as an assignment as well as a will, could take effect as a conveyance inter vivos of the immovable property of the testatrix situate in England.

Republica de Guatemala v. *Nunez* [1927] 1 K. B. 669 followed.

In re Hoyles [1911] 1 Ch. 179 considered and distinguished.

Rule 153, in Dicey's Conflict of Laws, 4th ed., dissented from.

ADJOURNED SUMMONS.

The following statement of the facts is taken in substance from the judgment :—

Clotilde Helena Fortunata Anziani (hereinafter called "the testatrix"), by birth an Italian and formerly the widow of a British subject, became the wife of Giovanni Anziani, an Italian subject. On the occasion of her marriage to him, two marriage settlements were executed relating to property belonging to her (hereinafter called respectively "the 'A' settlement and the 'B' settlement"). They were dated November 3, 1900. The first, the "A" settlement, was made between Signor Anziani, the testatrix, and two trustees, and related to the proceeds of sale of certain freehold hereditaments in England which had been conveyed to the trustees on trust for sale, and to certain investments and money. Those funds were settled upon trust, during the joint lives of the husband and wife, to pay to the husband out of the income an annual sum of 500*l.*, and subject thereto to pay the annual income to the testatrix during her lifetime without power of anticipation, and there was a provision that after her death the trustees should raise out of the "A" fund a sum or sums not exceeding in the aggregate 50,000*l.*, as the testatrix should by deed or will appoint, and pay the sum or sums so raised to such person as the testatrix should appoint, and should stand possessed of the residue of the trust fund, or, if no such appointment should be made, then of the whole thereof and of the annual income thereof, upon certain trusts, not relevant to the issues raised on this summons, and subject thereto in trust to the children and issue of the marriage—there were none—and subject thereto for such person or persons and purposes as the testatrix should while not under coverture by deed revocable or irrevocable or whether covert or sole by will, codicil or in writing executed in manner above mentioned appoint, and in default and subject to any such appointment upon the trusts that followed. The settlement was in the English language, and the trustees of both the "A" and the "B" settlements were British subjects resident in England.

The "B" settlement, which was in the same language, was made between the same parties with a slight difference with regard to the trustees, and by that settlement certain freehold properties which had been conveyed by the "A" settlement upon trusts to sell, and certain moneys invested, therein mentioned, were settled upon trust to pay the annual income of the trust fund to the testatrix during her life for her separate use without power of anticipation, and after her death in trust for such person or persons and purposes as the testatrix should whether covert or sole by deed revocable or irrevocable or by will or codicil appoint. The subsequent trusts were irrelevant to the present case because in fact there was an appointment.

Signor Anziani and the testatrix were married on November 19, 1900. The testatrix proceeded to make a number of appointments and charges under the power conferred on her by the two settlements, in particular, two appointments on which some of the questions raised on this summons depended. The first one was a deed of appointment of December 10, 1906, made between Signor Anziani and the testatrix of the first part, Signor Anziani of the second part, the testatrix of the third part, and the trustees of the "A" settlement of the fourth part, and executed in consideration of a transaction by which the trustees of the "A" settlement raised an advance of a substantial amount to the testatrix upon certain securities. In order to carry out that part of the transaction, the testatrix by the deed irrevocably appointed that the residue of the sum of 50,000*l.*, which she had power to appoint, under the trusts of the "A" settlement, should be a charge upon and raiseable and payable out of the trust property, subject to the trusts of the "A" settlement, and from and after her death, subject to her life interest therein, should be held in trust for her absolutely as her separate estate. Accordingly, irrespective of the motive for the appointment, which was to enable the sums to be raised and the trustees to be indemnified, some 50,000*l.* had been irrevocably appointed by the testatrix to be her own property.

The other deed was an instrument of appointment of May 23, 1912, and this related to the funds and properties the subject of the trust deed made between the testatrix of the first part, Signor Anziani of the second part, and the trustees of the "B" settlement of the third part. This, again, was executed to secure the various advances made to the testatrix out of the funds. It concluded with a clause providing that in consideration of the premises the testatrix "as beneficial owner, in exercise of the power for this purpose given to her by the settlement and of every other power enabling her in this behalf doth hereby irrevocably appoint and direct and declare that from and after her death and in the meantime subject to her prior life interest therein all the trust funds and property comprised in and subject to the trusts of the settlement and proceeds of sale thereof and the investments for the time being and from time to time representing the same and all other property subject to the power of appointment shall be held in trust" by the trustees, first, upon trust to pay thereout sums which the testatrix and Signor Anziani might at any time become liable to pay to the trustees under or by virtue of certain covenants of indemnity contained therein, and subject thereto in trust for the testatrix, her heirs, executors and assigns. The indenture contained no covenant to pay to the trustees the sums which they had advanced to the testatrix: the covenants in it were mere covenants of indemnity; and, the trustees not having been called upon to pay anything in respect of any liability incurred by reason of the advances, the appointment had not the effect that anything was payable out of the fund by reason of the covenant of indemnity. The important result of the appointment was that the trust fund and property subject to the life interest of the testatrix were thereby irrevocably appointed to the testatrix, her heirs, executors, administrators, and assigns. The testatrix and her husband continued to reside in Italy, and she was domiciled in Italy at the date of the document next hereinafter mentioned, and at the date of her death.

On July 28, 1927, she executed a document, hereinafter called the appointment and assignment, which was after her death admitted to probate in a particular form. It purported to be an appointment and assignment, and was executed as a deed in the presence of two witnesses, and the questions arising on this summons were mainly questions depending upon the true effect of that document in the circumstances of the case. It began as follows: "This appointment and assignment is made the 28th day of July, 1927, by me Clotilde Helena Fortunata Anziani (hereinafter called 'the appointor') of Via Antonio Nibby 6, Rome, in the country of Italy, the wife of Giovanni Anziani whereas these presents are supplemental to the respective settlements and deed mentioned in the First Schedule hereto"—those mentioned were the "A" and "B" settlements, and the deed of December 10, 1906, by which 50,000*l.* was appointed "under and by virtue whereof I the appointor am desirous of making such appointment and assignment of the said premises as is hereinafter contained and it is intended that these presents shall operate not only as a deed of assignment or transfer inter vivos but also as the last will and testament of me the appointor so far as regards the property hereinafter appointed and assigned Now these presents witness as follows: (1.) In exercise of any power for this purpose vested in me, and according to my estate and interest under the respective settlements and deed mentioned in the First Schedule hereto"—i.e., the deed of December 10, 1906—"I the appointor as settlor hereby appoint and assign unto Dennis Henry Herbert of 380 Gresham House Old Broad Street in the City of London Solicitor M.P., and Allan Tudor Davies of 2 White Lion Court Cornhill in the City of London Esquire Stockbroker (hereinafter called the trustees) all and singular the investments trust funds and property now or at any time hereafter subject or to become subject to the trusts of the respective settlements To hold unto the trustees absolutely subject so far as subject thereto or affected thereby respectively to all trusts by the respective settlements declared to take effect concerning the said respective premises during the life of me the appointor and during the life of my said husband if he shall survive me, and subject also to the respective mortgages, deeds of charge and indemnity short particulars whereof are contained in the Second Schedule hereto nevertheless upon the trusts and subject to the powers and provisions hereinafter declared concerning the same.

"2. In pursuance of my intention in this behalf I the appointor revoke all former testamentary dispositions made by me of the trust premises hereinbefore appointed or assigned or any part thereof, and in exercise of any testamentary power of appointment vested in me under the said respective settlements or otherwise hereby bequeath and appoint the said premises hereinbefore appointed and assigned subject as aforesaid unto the trustees upon the trusts and subject to the powers and provisions hereinafter declared concerning the same, and I appoint the trustees to be executors hereof."

"3. The trustees shall stand possessed of the said premises upon trust after my death to sell collect and convert the same into money so far as not consisting of money with full power to postpone such sale and conversion for any period which the trustees shall think proper and retain any investments but so that my trustees shall not sell or realize any reversionary interest unless they shall see special reason for so doing.

"4. The trustees shall out of the moneys arising from such sale collection and conversion and any moneys included in the appointment and assignment hereinbefore contained make the following payments (that is to say)":

The appointment and assignment then referred to the provision for the payment of all the debts owing by the appointor within the United Kingdom, "including any sum owing under the deeds mentioned in the second schedule hereto or any of them," and also certain duties. Secondly, there was provision for the payment of certain legacies bequeathed by the third schedule thereto, and there was provision for the investment of the residue mentioned, and the trust fund so created was directed to be held upon trust for the benefit of Signor Anziani, with provisions irrelevant to the present case. Subject to those trusts, the fund had to be applied in discharging further legacies bequeathed by the fourth schedule to the deed with interest, and the final residue in trust to Allan Tudor Davies for his own use absolutely; and clause 14 provided that "the appointor may at any time during her life by any deed or deeds revocable or irrevocable revoke or vary either wholly or partially the trusts and powers hereby declared and by the same or any other deed or deeds declare such new or other trusts or powers concerning the premises to which such revocation shall extend as the appointor shall think fit."

On February 10, 1929, the testatrix died, and on April 23, 1929, letters of administration with the will annexed of the estate which by law devolved on and vested in her personal representative were granted by the Principal Probate Registry to the plaintiffs, limited to the extent to which the power of appointment vested in her under the "A" and "B" settlements were thereby exercised.

The heirs of the testatrix, according to Italian law, were her husband, Signor Anziani, and her brother and sister, Cesare Augustus Scalzi and Marietta Gallian, who were defendants to the summons. The testatrix left no will or other testamentary disposition of her property, other than the appointment and assignment, and no proceedings in regard to the administration had been commenced, the reason being that there were substantial mortgages and other debts in Italy respecting her estate, and until the incidence of those debts had been settled, the heirs would not run the risk of assuming the liability which would have fallen upon them according to Italian law if they had accepted the estate. The property which at the date of the summons was subject to the trusts of the "A" settlement consisted of a number of freehold ground rents and mortgages in England, and the total estimated value was about 87,000*l.*, without including a further sum of 7770*l.*, the unexpended balance of an amount which the trustees were authorized to raise under an order of the Court. The property subject to the trusts of the "B" settlement consisted of certain freehold ground rents and investments in property and cash in England of the estimated value of nearly 20,000*l.* The testatrix was also possessed of property abroad, including a villa in Via Antonio Nibby in Rome subject to certain mortgages, the contents of the villa, bank balances in Rome, and certain freehold property in the district.

This summons, taken out by the trustees of the appointment and assignment, asked (inter alia) whether the appointment and assignment operated as a valid and effective assignment to the plaintiffs as trustees thereof of such part of the 50,000*l.*, as had not yet been applied, and of the balance of the "B" settlement funds and immovable property undisposed of at the testatrix's death, and whether it operated as a valid and effective appointment of the balance of the "A" settlement funds after raising and payment of the 50,000*l.*

Topham K.C. and *Bradley Dyne* for the trustees of the appointment and assignment. The appointment and assignment is wholly valid and takes effect inter vivos. It makes an immediate assignment of the reversionary interest to which the testatrix was entitled, and it is quite clear that, according to her estate and interest in the property—which she appointed to herself—she assigned it to the trustees. The assignment takes effect once for all, and the trustees are bound by the document. The appointment and assignment, whether it is to take effect as a will or as a deed inter vivos, does not comply with the requirements of Italian law. Under Italian law the testatrix had full power to dispose of the estate, provided that she left to her husband the usufruct in one-third thereof. The " A " and " B " settlements must be construed and must take effect according to English law: *In re Hoyles.* (1) As to capacity, see *Bank of Africa, Ld.* v. *Cohen.* (2) The appointment and assignment, so far as it deals with immovables in this country, takes effect according to English law, and Italian law does not apply: *In re Berchtold* (3); see also Dicey's Conflict of Laws, Rules 152 and 153, 4th ed., pp. 575 and 580 (4); *Kelly* v. *Selwyn* (5); *Rigden* v. *Vallier* (6); *Dillon* v. *Coppin* (7); *Marjoribanks* v. *Hovenden.* (8) A document executed in the form of and intended to operate as a deed can and does so operate, even though intended to do so only from the death of the person executing it. The appointment and assignment is effective for the trusts which it purports to create: *Kelly* v. *Selwyn* (1); *Republica de Guatemala* v. *Nunez.* (2)

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(1) [1911] 1 Ch. 179.

(2) [1909] 2 Ch. 129.

(3) [1923] 1 Ch. 192.

(4) Rule 152. " An assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs), wherever such assignment is made, is valid."

Rule 153. " An assignment of a movable which cannot be touched, i.e., of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt) is valid. Provided that (1.) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor; (2.) the right to recover the debt is, as regards all matters of procedure, governed by the lex fori."

(5) [1905] 2 Ch. 117.

(6) (1751) 2 Ves. Sen. 252.

(7) (1839) 4 My. & Cr. 647.

(8) (1843) Dru. 11.

B. F. Mendel for a trustee of the "A" settlement and a trustee of the "B" settlement.

Sir Gerald Hurst K.C. and *J. W. F. Beaumont* for the husband.

Jenkins K.C. and *Eardley-Wilmot* for the other heirs, Scalzi and Gallian. The fact that in the present case the assignees are English is the only difference between it and *Republica de Guatemala* v. *Nunez.* (2) A document intended not to apply till after death is purely testamentary.

MAUGHAM J. [having stated the facts:] It is important that the questions involved in this summons should be determined at once, otherwise I might have been tempted to put my judgment in writing.

In this Court the appointment and assignment must be taken to be a valid testamentary instrument or will, properly executing the powers of appointment vested in the testatrix under the "A" and "B" settlements. It is not disputed that, being a will so far as it purports to exercise the powers, it is effective in English law as an appointment of all the property remaining subject to the powers of appointment contained in either the "A" settlement or the "B" settlement. There was, however, as I have said, no such property remaining under the "B" settlement. The power of appointment had already been executed dealing with the whole of that property. The remainder of the 50,000*l.* appointed in 1906 was also in the same position, because the sum could no longer be subject to a power of appointment. The appointment will therefore operate on all the real and personal estate remaining subject to the trusts of the "A" settlement, subject to raising out of her property the remainder of the sum of 50,000*l.* I have felt no difficulty in deciding that under the terms of the appointment the whole of the debts due by the testatrix within the United Kingdom, including the sums owing under the deed mentioned in the second

(1) [1905] 2 Ch. 117.

(2) [1927] 1 K. B. 669.

schedule to the appointment, must be paid out of the property effectively appointed by the appointment. There remains, however, the property to which the testatrix herself is entitled, either in Italy or in England. This includes the balance of the 50,000*l.*, and the other property which I have mentioned.

In order to determine the questions which arise, I have to state shortly the effect of Italian law with regard to such a disposition as is effected by the appointment and assignment, that law being relevant so far as that deed purports to assign the testatrix's personal property in this country. That law has been stated very clearly by an acknowledged expert in Italian law, Signor Giuseppe Miria Palliccia, the special attaché to the Italian Embassy in this country. On July 16, 1927, he made an affidavit, which is accepted by all parties, and in order to remove any possible doubt as to the matters deposed to in that affidavit, he was called before me, and gave evidence. One of the questions asked of him, and dealt with in his affidavit, was in relation to the validity of such a deed, which Italian law would regard as an assignment inter vivos of a voluntary character. It is clear that there was no consideration for the execution of that deed. He said, in his answer to a particular question: "Subject to compliance with the formalities prescribed by Italian law as to making the document, which is a public instrument, i.e., an instrument drawn up with the formalities required by law by a notary or other public officer duly authorised in the place where the document is made (Articles 1056 and 1315 of the Italian Civil Code) and with the articles regulating the validity of a donation inter vivos (Articles 1050 and 1057) Signora Anziani had full capacity to dispose of the property by assignment inter vivos. Assuming that the instrument of July 28, 1927, was not only executed with the formalities required by Italian law, but also may be considered a donation inter vivos under Italian law, it is to be observed that, by Article 1091, dispositions of property made by donation inter vivos which exceed the quota of the disposable property, are reducible down to such quota at the time of the donor's death."

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I will not pause to read the rest of the affidavit, but it was quite apparent that Signor Palliccia was very carefully guarding himself, and therefore I thought it desirable that he should explain exactly what he meant by the condition at the very end of the clause. He had already made certain statements to the plaintiffs which were embodied in admissions accepted by all parties as correct, and I should first read those. There are two of them. The first is that the appointment and assignment of July 28, 1927, was executed by the wife in Italy, and without the formalities mentioned in Signor Palliccia's affidavit; the second is, that, according to Italian law, the document is a voluntary assignment inter vivos of personal property belonging to the assignor, and is void by reason of non-compliance with the formalities. Then, when he was called, he pointed out that, according to the Italian Civil Code, art. 1050, a donation is an act of spontaneous liberality whereby the donor divests himself actually and irrevocably of the thing given, in favour of the donee, who accepts it. I pause to observe upon that, first, that in this deed there is the power of revocation, and secondly, that there is nothing to show that the donee, who was the trustee, ever did accept the gift. Then he stated the effect of art. 1056, which is as follows: "All acts of donation must be done by a public instrument, otherwise they are null and void." Then, by the first paragraph of art. 1057: "A donation is not binding on the donor and has no effect before the day on which it is accepted." He stated quite clearly that, accordingly, the appointment is not, according to the views of the Italian lawyer, a donation, and that, since there is no consideration for it, the provisions of the article do not apply. If it were an act of donation not being effected by a public instrument, it would be wholly void, and that, in Signor Palliccia's view, is not a mere matter of form, but an essential element of the gift. He stated that it was necessary that the document should have the nature of a public act, and that this is a matter of public policy. These matters, I may add, are somewhat confusing from the point of view of a foreign lawyer, because the system in Italy differs so very

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widely from the English system. The "A" and "B" settlements are, as Signor Palliccia says, wholly void from the point of view of Italian law. The trusts do not exist, and powers of appointment are unknown. Therefore it is not surprising that according to Italian law such a document as the appointment presents considerable difficulty and is wholly null and void.

I think that I ought to point out, before proceeding further with this matter, that I am not on this summons administering the estate of the testatrix, and I have not before me her estate represented by the administrators of her general estate. The questions on the summons relate merely to property in some way subject to the trusts of the "A" settlement and the "B" settlement. I think that I am entitled to decide whether the appointment and assignment of July 28, 1927, is effective as regards such a chose in action as arises, under the "A" settlement or the "B" settlement, in any part of the property passing thereunder and held under the trusts thereof. The primary question, therefore, that arises in reference to these provisions of Italian law, is whether the appointment can be regarded as an assignment of such part of the sum of 50,000*l.* as has not yet been disposed of. It is asserted on the one hand that, since the chose in action is locally situated in this country, the law of this country must prevail. This is a matter that has been greatly discussed among jurists, and has been the subject of very recent elaborate consideration in the Court of Appeal. In Dicey's Conflict of Laws, 4th ed., there are two rules laid down with regard to the assignment of property by people who are domiciled abroad. The first rule to which I should like to refer is r. 152, which Dicey states in this form: [His Lordship stated the rule and continued:] The second rule is r. 153: [His Lordship read the rule and continued:] I should observe with regard to the first rule that I have mentioned, r. 152, that I think that it would be more accurate if, instead of the word "assignment," the word "transfer" had been used, because it is clear, if one looks at the note and at the comment, that the rule is really referring to the transfer of goods, effected generally by delivery, sometimes in market overt. I do not think that anybody can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situate. Business could not be carried on if that were not so. The second rule, which the learned author has stated as a sort of antithesis to the first is, I think, not accurate, and for this view I have the authority of the Court of Appeal in *Republica de Guatemala* v. *Nunez.* (1) I do not think that it is necessary for me, having regard to that decision, to examine the earlier authorities. The case was one which presented a somewhat close resemblance to the present case. It related to a sum of money deposited by one Cabrera, who was at one time President of the Republic of Guatemala, with a bank in London. "Subsequently"—I am reading from the headnote—"he, being then in Guatemala, assigned in writing by way of gift the money so lying to his credit at the bank to Nunez, who was also domiciled in Guatemala, and written notice of that assignment was given to the bank. It was not disputed that, if the effect of that assignment had had to be decided by English law it would have been held good. By the law of Guatemala an assignment of money made without consideration is void, unless made by a document executed before a notary on stamped paper, and signed by both parties; and by the same law an infant cannot accept a voluntary assignment himself, it must be made to and accepted by a legal representative appointed by a judge on the infant's behalf. The assignment was on unstamped paper, was not executed before a notary, and was not signed by Nunez. At the time of the assignment Nunez was an infant, and no legal representative had been appointed. The money lying in the bank having been claimed both by the republic of Guatemala and by Nunez the bankers interpleaded. In an action to determine the issue between the two claimants: Held, that the validity of the assignment to Nunez must be determined by the law of Guatemala, and [it] was therefore bad." The right of action against the London bank was, in a sense, property situate in this country. It will

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(1) [1927] 1 K. B. 669.

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be noted, therefore, that the facts were the same as in the present case, with this one difference, which I do not regard as important, that here the trustees, to whom it is said the property had been assigned by the appointment of 1927, are in England. It was decided, first by Greer J., and then by the Court of Appeal, that the assignment was bad. On one ground or another they held that the validity of the assignment must be determined by the law of Guatemala, and accordingly r. 153, as stated by Dicey, was not accepted as being a correct statement of the law. It is perhaps unfortunate from my point of view that the Lords Justices did not decide the case on exactly the same grounds. Bankes, Scrutton and Lawrence L.JJ. each put the ground in a somewhat different way. Scrutton L.J. gave as one ground of his decision, following the judgment of Greer J., which unfortunately is not reported, the following reason for holding that the contract was void. After giving one reason for holding that the transaction was void, he said that Nunez, being a minor and incapable, by the law of his domicil or the law of the place where the transaction took place, of making a valid donation, it followed that the gift to him was void, and accordingly he could not receive a good title to the deposit in the English bank by such a donation. Then the learned Lord Justice continued as follows: (1) "This view would support the judgment of Greer J., but is not the express ground on which he puts his decision, which is, I think, that a contract void in the place where it is made, by reason of the omission of formalities required by the law of that place, is void elsewhere; the case of void contracts being distinguished from that of contracts merely inadmissible in evidence by reason of the absence of formalities, such as the requirements of stamp laws, not invalidating the contract itself. This seems to me a second point on which the authorities are fairly clear, namely, that where a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to the omission of formalities or stamp, it will not be recognized in England." The learned

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(1) [1927] 1 K. B. 669, 690.

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Lord Justice, after citing and quoting from a number of authorities, then continues: "In the present case, the private unstamped donation made in Guatemala from one Guatemalan subject to another was a nullity by the law of Guatemala, I think it was therefore a nullity by the law of England." Then, after considering the opinion of Professor Dicey as stated in r. 153, and coming to the conclusion that the authorities cited do not support the proposition, he continues: "It seems to me, therefore, that the authorities cited by Mr. Dicey do not support the proposition that a transaction as to an English debt, void by the law of the country where it takes place and by the law of the domicil of the parties to it, will be treated as valid in the country where the debt is deemed to be situated. In my opinion, both the capacity of the parties to enter into such a transaction and the validity and effect of such a transaction must be determined by one or other of those laws; and in this case they are the same." That is a reference to the law of the country where the transaction takes place, and the law of the domicil of the parties to it, which in this case must be the law of the domicil of the appointor.

I understand that Scrutton L.J. was there following the view of Greer J., and although the other Lords Justices do not, at any rate in terms, take the same view, I am content to follow, with respect, the statement of the law by Scrutton L.J., and I venture to add that any other view is bound to result in an anomaly and, in many cases, to cause a considerable amount of injustice. How far a question relating to a right acquired under a foreign law is a matter of the comity of nations, as Farwell L.J. asserted in *In re Hoyles* (1), is a question that I will not at present discuss, but I would observe that the comity of nations, whatever that phrase may include, certainly does not require the Courts of this country to recognize as valid a voluntary assignment of a movable entered into here by a domiciled Italian which by Italian law, for reasons of public policy, is regarded as null and void. It follows, in my opinion, that the remaining portion of the

(1) [1911] 1 Ch. 179.

50,000*l.* appointed by the deed of December 10, 1906, cannot be regarded as having been effectually assigned by the appointment and assignment of July 28, 1927.

It has been contended that this property should be regarded as partly in the nature of an immovable for the reason that the sum might be raised by a sale of part of freehold or leasehold estates subject to the trusts of the "A" settlement. The contention is, I presume, that there should be an apportionment pro rata between the values of the immovable estate and the movable estate included in this settlement, of which the balance of the 50,000*l.* should be regarded as part. *In re Hoyles* (1), to which I have already referred, is cited on that point. That is a case which decided that a mortgage of land is an immovable. Careful attention to the judgment in that case shows, I think, not only that the question is one of some difficulty, but that the decision is based upon the fact that the mortgagee is for many purposes regarded as the owner of the land. If he is a legal mortgagee he is in law, of course, the owner. "If he sues on the covenant to pay," as was pointed out by the Master of the Rolls (1), "he must reconvey the land on payment. If he has parted with the land otherwise than in exercise of a power of sale, he would be restrained from suing on the covenant. The result is that a mortgagee cannot assign the mortgage debt effectually without also transferring the security upon the land." Farwell L.J. points out that "the mortgage undoubtedly affects the land directly; the mortgagee can enter and take possession at any time after his estate has become absolute at law; he can by foreclosure acquire the full title to the land in fee"; and other reasons of the same sort are given.

In the present case the appointees of the sum of 50,000*l.* have no right whatever to the land assigned. The right of the appointees is merely to require the trustees to raise the sum in question, and the sum might very well be raised without selling the freehold estate or the leasehold estate. Accordingly in my view there is no ground for saying that an appointee of a sum of money, i.e., the 50,000*l.*, or a part thereof, in such circumstances as exist here, is a person entitled to immovable property. I think that the right is a right to call upon the trustees to pay the amount in question, and that is a chose in action which must be treated as possessing the character of a movable.

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(1) [1911] 1 Ch. 179, 184, 187.

There remain some ground rents included in the "B" settlement which are immovables situate in this country, and the question arises whether, having regard to the appointment of the whole of the property in the "B" settlement to the testatrix herself, the appointment and assignment of 1927 may not have operated as a conveyance of that portion of the property to the trustees of the appointment. English law, of course, applies to a conveyance of immovable estate situate in England. The principle is stated, in r. 150 in Dicey, as follows: "All rights over, or in relation to, an immovable are" (subject to certain exceptions which are not relevant to the present case) "governed by the law of the country where the immovable is situate."

The question, therefore, that arises is whether the appointment and assignment of 1927 is a deed capable of conveying property inter vivos to the trustees mentioned in that deed. This question raises certain problems in regard to wills which have very seldom arisen in modern times. It is quite clear that, under English law, an instrument may be executed which is partly testamentary and partly not testamentary. The authorities for that proposition are to be found in the 8th edition of Theobald at p. 15. I must accept the document in the present case as partly testamentary, having regard to its having been admitted to probate. I think, also, that it is quite clear, as stated in Theobald at p. 14, that a deed that is not intended to have any effect until the testatrix's death is testamentary, and I doubt very much whether a document not intended to have any effect until her death could be regarded from any point of view as a conveyance inter vivos. On the other hand, it is to be observed in the present case that the appointment and assignment of 1927 expressly states that the deed is intended to operate not only as a deed of assignment or transfer, but also as the last will and testament of the appointor so far as regards the property thereinafter appointed and assigned. In addition to that it is to be noted that the first recital states that those presents are supplemental not only to the respective settlements, but to the deed of December 10, 1906, by which the sum of 50,000*l*. was appointed to the testatrix absolutely. The first witnessing clause states, as I have already mentioned, that the testatrix purports, according to her estate and interest under the settlements and the said deed, to appoint and assign unto the trustees "all and singular the investments, trust funds, and property now or at any time hereafter subject or to become subject to the trusts of the said respective settlements." The deed I may add is executed after the modern alteration of the law, with the absence of words of limitation.

On the whole, I have come to the conclusion that this appointment can, according to English law, have effect as a conveyance inter vivos of the real estate belonging absolutely to the testatrix at the time of her death, and would accordingly operate on the freehold ground rents subject to the trusts of the "B" settlement.

Solicitors: *Beaumont & Son*; *Birkbeck, Julius, Edwards & Co.*

K. R. A. H.

LUXMOORE J.

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Dec. 12, 13, 17, 18.

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[1928. C. 1896.]

Land Registration—Rectification of Register—Land erroneously registered under repealed Acts—No Title in registered Proprietor—Claim for Rectification by rightful Owner—Land Transfer Act, 1875 (38 *&* 39 *Vict. c.* 87), *ss.* 7, 95—*Land Transfer Act,* 1897 (60 *&* 61, *Vict. c.* 65), *s.* 7—*Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *ss.* 1, 2, 82, *sub-s.* 1 (*a*) (*g*) (*h*); *sub-s.* 3 (*a*) (*c*); *s.* 144, *sub-ss.* 1 *and* 2; *s.* 147.

A purchaser of freehold land caused himself to be registered as first proprietor thereof with an absolute title under the Land Transfer Acts, 1875 and 1897. By the conveyance to him, certain strips of woodland were included, to which the vendors had no title, and which the purchaser also had registered :—

Held, that the Court, having decided that some other person was properly entitled to the fee simple of the strips in question, immediately before the registration, and that the registration had been done without the assent of the rightful owner, has power under the Land Registration Act, 1925, s. 82, sub-s. 1 (*g*) and (*h*), and sub-s. 3 (*a*) and (*c*), to direct rectification of the register by the omission from the registered plan of the portion of the land erroneously registered.

The power to rectify conferred by the Land Registration Act, 1925, is an express power conferred by that Act, and rectification is therefore possible not because the old Acts or either of them have or has been repealed, but by reason of the fresh power conferred by the new Act.

ACTION.

The plaintiffs were on April 22, 1925, registered as proprietors, with an absolute title under the Land Transfer Acts, 1875 and 1897, of certain freehold land in the parishes of Walton-on-the-Hill and Ashtead in the county of Surrey, shown and edged with red on the plan filed in the Land Registry, No. P. 12,039. The land was known as the Downs Field or Downs View, and had been purchased shortly before the registration at an auction sale by the plaintiffs from the executors of one Pantia Ralli.

In the action, which was for trespass, the plaintiffs by their statement of claim alleged that the land included within its eastern boundary (where it adjoined a sheep walk) and within its north-eastern boundary a strip of woodland of varying width (known as the Shaws). They admitted that the defendant, Mrs. V. M. Lyall, was the owner of the soil of the sheepwalk and of the land adjoining the north-eastern boundary of the plaintiffs' land. The defendant having entered upon the Shaws to cut underwood, the plaintiffs claimed an injunction to restrain her, her agents servants and workmen from so trespassing thereon.

The defendant denied the plaintiffs' claim to the land, and contended that she and her predecessors in title by themselves their lessees and tenants had continuously from a date before the year 1893 been in undisturbed possession (inter alia) of the eastern part of the strip of woodland, known as the Sheepwalk Shaw, lying between the plaintiffs' land and the sheepwalk (the property of the defendant), and she denied any right of the plaintiffs to the said eastern part of the Sheepwalk Shaw. She contended that the eastern part of the Sheepwalk Shaw was bounded on its western side by a shallow ditch, which could be traced as dividing the Sheepwalk Shaw for its entire length into two parts. The defendant also contended that she and her predecessors in title, the owners of the land lying to the north of the plaintiffs' land, called the Northern Field, and to the west of the sheepwalk, by themselves their lessees and tenants had from before 1893 been in continuous undisturbed possession of the northern part, and from 1911 in undisturbed possession of the whole of the strip of woodland called the Northern Shaw adjoining the northern boundary of the plaintiffs' land as particularly indicated.

The defendant also alleged that in 1911, one H. C. Lyall, the defendant's husband, and a predecessor in title settled and agreed with Pantia Ralli, the predecessor in title of the plaintiff and then owner of the estate of which the plaintiffs' land formed part, the boundaries between their respective estates, including, among others, the plaintiffs' land on the one hand and the sheepwalk and Northern Field on the other hand; and that by this agreement the boundaries were so adjusted as to include the whole of the Northern Shaw and the eastern part of the Sheepwalk Shaw claimed by the plaintiffs. Further that at the time this agreement was arrived at, the said Pantia Ralli had acknowledged the title of H. C. Lyall to the eastern part of the Sheepwalk Shaw and the whole of the Northern Shaw, and admitted that H. C. Lyall was in possession thereof, and so far as he was not in possession thereof the said Pantia Ralli had delivered him possession of the said eastern part of the Sheepwalk Shaw and the whole of the Northern Shaw. The defendant relied also upon the Statutes of Limitation. Further, in view of the fact that the plaintiffs had been registered with an absolute title under the Land Transfer Acts, 1875 and 1897, as owners of the land in question, she counterclaimed (inter alia) for an order that pursuant to the Land Registration Act, 1925, s. 82, the register of the plaintiffs' title to the land might be rectified by excluding therefrom the said eastern part of the Sheepwalk Shaw and the Northern Shaw.

The plaintiffs denied the contentions of the defendant. In the course of the proceedings evidence was given by the defendant's witnesses as to the ditch above referred to constituting a boundary between the plaintiffs' land and the defendant's, which evidence was accepted by the learned judge; also as to acts of ownership by her predecessors in title over the land in dispute, and as to the arrangement come to in 1911.

Sir Thomas Hughes K.C. and *N. C. Armitage* for the plaintiffs. The defendant is not entitled to succeed on the counterclaim. The plaintiffs have been registered with an absolute title under the old Land Registration Acts, 1875 and 1897, and it is submitted it cannot therefore be impeached. If any liability exists, an indemnity fund is provided for by s. 83 of the Land Registration Act, 1925, which has replaced the old Acts. The boundaries of the land in dispute have been fixed, and the filed plan in the Land Registry indicates it. See Land Registration Rules, 1925, r. 278.

[LUXMOORE J. The onus is on the defendant to show that it is her property.]

The defendant cannot attack the registered title unless she can show and prove one of the facts provided for by the

Land Registration Act, 1925, s. 82, sub-s. 3. (1) This new Act has taken the place of the Land Transfer Acts, 1875 and 1897, and governs the whole matter, though the plaintiffs were, of course, registered under the old Acts of 1875 and 1897. Under the Land Transfer Act, 1875, the sections dealing with registration are 5, 6, 7 and 8, and so far as rectification of the register was allowed, ss. 95 and 96 would be applicable. (2)

The Land Transfer Act, 1897, first introduced the principle of indemnity: see s. 7 of the Act. (3) It is submitted that it really means indemnity for an aggrieved person. As to rectification for indemnity see Brickdale on the Land

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(1) Land Registration Act, 1925, s. 82, sub-s. 3: "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession:—

"(*a*) Unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or

"(*b*) Unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void; or

"(*c*) Unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him."

(2) Land Transfer Act, 1875, s. 95: "Subject to any estates or rights acquired by registration in pursuance of this Act, where any court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just."

Sect. 96: "Subject to any estates or rights acquired by registration in pursuance of this Act, if any person is aggrieved by any entry made or by the omission of any entry from the register under this Act, or if default is made, or unnecessary delay takes place in making any entry in the register, any person aggrieved by such entry omission default or delay may apply to the court in the prescribed manner for an order that the register may be rectified, and the court may either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register."

(3) Land Transfer Act, 1897, s. 7, sub-s. 1: "Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided."

Registration Act, 1925, 3rd ed., p. 274; *Attorney-General* v. *Odell.* (1)

Registration is now effected under the Land Registration Act, 1925, and the effect is to vest in the person registered as a first proprietor with an absolute title an estate in fee simple in possession subject, unless the contrary is expressed on the register, to "such overriding interests, if any, as affect the registered land": see s. 5 of the Act (2); and as to "overriding interests" see s. 70 of the Act of 1925 (2); and also s. 82, sub-s. 3. (3) This Act gives the plaintiffs an unimpeachable title, and there are no "overriding interests" which affect their title.

Rectification of the register is provided for by s. 82 of the Act; and though it must be admitted that the cases contemplated by sub-s. 1 (*h*) of the section are wide, we say that they are not so wide as may appear from the wording. (2) The power of rectification conferred by this s. 82 cannot apply here by reason of s. 147 of the same Act.

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(1) [1906] 2 Ch. 47, 53.

(2) Land Registration Act, 1925, s. 5: "Where the registered land is a freehold estate, the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an estate in fee simple in possession in the land, together with all rights, privileges and appurtenances belonging or appurtenant thereto, subject to the following rights and interests, that is to say:—

"(*a*) Subject to the incumbrances, and other entries, if any, appearing on the register; and

"(*b*) Unless the contrary is expressed on the register, subject to such overriding interests, if any, as affect the registered land." . . . .

Sect. 70, sub-s. 1: "All registered land shall, unless the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say)

"(*a*) Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register."

Sect. 82, sub-s. 1: "The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:—

" . . . . (*h*) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register."

(3) See note (1) ante, p. 429.

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The right to indemnity conferred by the Land Registration Act, 1925, s. 83, has largely extended the scope of the corresponding section of the Act of 1897, s. 7, and the indemnity, if any, is borne by the insurance fund : see s. 85 of the Act of 1925.

The rules made under the 1925 Act are given the force of statute. There are rules relating to the fixing of boundaries, but it is submitted that it is not a case of boundaries here: see the rules 276, 277 and 278. The registrar acts in a quasi-judicial capacity.

It is submitted that this is not a case for rectification. An "absolute" title means what it says, and if any one is prejudiced there is the insurance fund. As to the effect of registration see *Capital and Counties Bank* v. *Rhodes*. (1)

J. W. Manning K.C. and *C. L. Fawell* for the defendant. The evidence put forward on the part of the defendant is partly documentary and partly oral. It is admissible by reason of the admission as to ownership of the land by the plaintiffs' predecessor in title: see *Bridgman* v. *Jennings* (2), a decision of Holt C.J. as to the evidence of an owner fixing boundaries ; *Doe* d. *Baggalley* v. *Jones* (3), as to evidence of land not being copyhold ; *Woolway* v. *Rowe* (4), and Denman C.J.'s judgment ; and also see the remarks of Bankes L.J. in *Falcon* v. *Famous Players Film Co.* (5)

On the question of rectification of the register, a consideration of the Land Transfer Acts, 1875 and 1897, is required. Under the Act of 1875 it is admitted that there was no power to rectify as against a person, being a first proprietor registered with an absolute title : compare ss. 7 and 95 of the Act, and see Brickdale and Sheldon on the Land Transfer Acts, 2nd ed., pp. 149 and 231. Under s. 111 there was power to make rules : see the Rules of 1903, rr. 36 and 37, and as to boundaries, r. 272.

Under the Land Transfer Act of 1897, there was apparently no power to rectify, but a right of indemnity was given

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(1) [1903] 1 Ch. 631.
(2) (1699) 1 Ld. Raym. 734.
(3) (1808) 1 Camp. 367.
(4) (1834) 1 Ad. & El. 114, 118.
(5) [1926] 2 K. B. 474, 488.

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by s. 7, though sub-s. 2 of s. 7 gives a limited power of rectification. These Acts were replaced by the Land Registration Act, 1925, and the Court has ample power under s. 82 to rectify the register. This Act applies to land registered before the Act came into force, and there is nothing contained in the Act to the contrary; and see the powers given to the registrar by rr. 13 and 14 of the Land Registration Rules of 1925.

Sir Thomas Hughes K.C. in reply. The defendant has produced no tangible evidence of possession of this disputed piece of land. The verbal arrangement alleged to have been arrived at in 1911 has not been completed by any deed and cannot therefore be considered: the Real Property Law Act, 1845, s. 3, now replaced by the Law of Property Act, 1925, s. 52. On the question of admissions as evidence see *Doe* d. *Norton* v. *Webster.* (1) The cases cited on behalf of the defendant on this question do not touch the point.

The plaintiffs have now got a registered title under the Act of 1925, and consequently cannot be deprived of this land by any action on the part of the defendant.

LUXMOORE J. The plaintiffs, Chowood, Ld., seek an injunction to restrain the defendant, Mrs. Violet Mary Lyall, from trespassing on land at Walton-on-the-Hill in the county of Surrey. The act of trespass complained of is the cutting of underwood by the defendant in certain shaws, to which the plaintiff company claims to be entitled. The defendant admits the cutting of the underwood, but justifies it on the ground that she and not the plaintiff company is the owner of the land on which the cutting was made.

The question, therefore, to be determined is one of title. It is admitted that the plaintiff company has been registered under the Land Transfer Acts, 1875 and 1897, as the owner of the land in question, with other land, with an absolute title; and that unless and until the register is rectified, the defendant can have no defence to the action. The defendant has, therefore, put in a counterclaim to have the register

(1) (1840) 12 Ad. & El. 442, 449, 450.

rectified. The plaintiff company has resisted the claim for rectification by denying the defendant's title to the land, and also by denying her right to rectification, even assuming that at the date of registration the defendant and not the plaintiff company was in fact the owner of the land. The argument on behalf of the plaintiff company is that there is no power to rectify the register where there is a mistake, and the registration is not induced by any fraud on the part of the registered proprietor, and that therefore the sole remedy of the defendant as a person aggrieved by the mistake is against the indemnity fund constituted under the Land Transfer Acts, 1875 and 1897, and the Land Registration Act, 1925, which has now taken the place of those Acts.

In view of the admissions made on behalf of the defendant, it is necessary in disposing of this case to deal first with the counterclaim, for it is contended on behalf of the plaintiff company and admitted by the defendant that the effect of registration with an absolute title is to confer on the first registered proprietor—I am reading from the Land Transfer Act, 1875, s. 7—" An estate in fee simple in [the registered] land together with all rights, privileges, and appurtenances belonging or appurtenant thereto"—and then subject to certain specified things—" but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors." This section has been replaced by the Land Registration Act of 1925, s. 5, which for all practical purposes is in the same terms.

Now the question whether the defendant is entitled to have the register rectified must depend on three separate considerations. First, and this is a question of fact, was the defendant entitled to the land in question at the date of the first registration ? Secondly, was the first registration made without her assent ? This is again a question of fact. Thirdly, and this is a question of law, Is there power, either under the Land Transfer Acts, 1875 and 1897, or the Land Registration Act of 1925, or otherwise, to order rectification of the register ?

I propose to deal with the three considerations I have mentioned in the order in which I have referred to them. First, let me consider the facts so far as they are material. [His Lordship stated the facts].

I am satisfied on the evidence that the Northern Shaw and the eastern side of the Sheepwalk Shaw was in the possession of Mr. Lyall and his predecessors in title in 1868, and has remained in their possession and the possession of Mrs. Lyall, down to the time when the dispute arose; but even if I should be mistaken in this view, I am satisfied that, after the arrangement made between Mr. Ralli and Mr. Lyall in 1911, Mr. Lyall and his successors remained in possession of the pieces of land in dispute in circumstances sufficient to confer on them an unassailable title under the Real Property Limitation Act, 1874. Mr. Lyall had claimed that the pieces of land in dispute were his and Mr. Ralli admitted that claim, and never, after 1911, during the rest of his life, set up any adverse claim to these pieces of land. In these circumstances, Mrs. Lyall's statutory title was complete before the date of the plaintiffs' registration.

It has been argued by Sir Thomas Hughes on behalf of the plaintiffs that there is nothing to support the claim on behalf of the defendant to have been in possession of the pieces of land in dispute, and at the most the matter rests on a verbal agreement which has not been completed by the execution of any deed and is therefore void under the Real Property Law Act, 1845, s. 3, which is now replaced by the Law of Property Act, 1925, s. 52. The section in question enacted that "A feoffment made after . . . ., other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed." In my view this section has no bearing on the present case. The defendant does not seek to use the admission as a conveyance of the land, but as evidence of her title to it. In my judgment what was done in 1911 was an admission by Mr. Ralli of the Lyall title, and as such is admissible in evidence against those claiming under Mr. Ralli, including the plaintiff company.

On the plaintiffs' side the only evidence of title to the property in question, beyond the Land Certificate, is a cutting of the whole of the Sheepwalk Shaw in 1908 by a man, employed by Mr. Ralli, and the cutting of the Northern Shaw shortly before the dispute in 1911. I am satisfied on the evidence that the Northern Shaw and the eastern side of the Sheepwalk Shaw to the east side of the dry ditch, have always been in the possession of Mrs. Lyall and her predecessor in title, and were never in the possession of Mr. Ralli; and that at the date of the registration on April 22, 1925, Mrs. Lyall was in fact entitled to those two pieces of land and was in possession of them, and that the plaintiffs' vendors had no title to these pieces of land, which would give them in fact any right to convey them to the plaintiff company.

This being so, the second question arises: Did Mrs. Lyall assent to the registration of the plaintiff company? In my view there is nothing that can in any aspect of the facts be considered as such an assent, and consequently I hold that the registration was made without Mrs. Lyall's assent and in derogation of her rights, so far as the pieces of land in dispute are concerned.

The third point must therefore be considered: in the circumstances which I have now stated, can the register be rectified? In determining this question, it is necessary to consider the Land Transfer Acts, 1875 and 1897, and the Land Registration Act, 1925. The Land Transfer Act, 1875, so far as it is material, provides in s. 7 that "The first registration of any person as proprietor of freehold land (in this Act referred to as first registered proprietor) with an absolute title, shall vest in the person so registered an estate in fee simple in such land, ... subject as follows; (1.) (2.) and (3), but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors." There was no power to rectify the register under the Act of 1875, except so far as a power of rectification was conferred by s. 95. That section provided that: "Subject to any estates or rights acquired by registration in pursuance of this Act, where any court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, such court may make an order directing the register to be rectified in such manner as it thinks just." It is to be noticed that that section as to the right to rectify is prefaced by the words: "Subject to any estates or rights acquired by registration in pursuance of this Act." By s. 7 of the Act, to which I have already referred, registration with an absolute title vests an estate in fee simple against all the world, and it would therefore seem that at any rate against the first proprietor, no rectification would have been possible. I think that position is admitted by Mr. Manning in his argument, and I agree that he was bound to make it.

The Act of 1875 was extended to some extent by the Act of 1897, but it is a question whether the later Act confers any power of rectification beyond the power conferred by the Act of 1875. The only section which it is suggested confers such extended power is s. 7. That section provides by sub-s. 1 that "Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principal Act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this Act provided." It will be seen that this sub-section merely constitutes an indemnity fund, and certainly does not give any power of rectification which is not given by the principal Act, that is the Act of 1875. Sub-s. 2 also relates to compensation for error. It is: "Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity." In my view this sub-section does not extend the power to rectify conferred by the Act of 1875.

The question then arises whether the Land Registration Act, 1925, confers any power of rectification which is applicable to a first registration made before that Act came into force, that is, before January 1, 1926. Sect. 1 provides that: "There shall continue to be kept at His Majesty's Land Registry, a register of title to freehold land and leasehold land"; and s. 2 makes provision for the different kinds of estates which may be registered, and by sub-s. 2 enacts that "Subject as aforesaid, and save as otherwise expressly provided by this Act, this Act applies to land registered under any enactment replaced by this Act in like manner as it applies to land registered under this Act." In other words, except so far as is otherwise expressly provided by the Land Registration Act of 1925, the Land Transfer Acts of 1875 and 1897 are replaced entirely by the Land Registration Act, 1925. Sect. 82 of the 1925 Act provides for rectification as follows; the powers conferred are very much wider than those contained in the Land Transfer Act, 1875, s. 95. "The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section." Then the material sub-paragraphs of sub-s. 1 are these, (*a*), (*g*) and (*h*). By sub-s. 1 (*a*) it is provided that "Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate, right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, and makes an order to that effect"; (*g*) "Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner"; and (*h*) is in general words: "In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register." It is to be observed that sub-para. (*a*) is expressed to be subject to any express provision to the contrary in the Act. The only place where such provisions are to be found is s. 82, sub-s. 3. That sub-section provides that: "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession—(*a*) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought"; and sub-para. (*c*): "Unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him." The register therefore is not to be rectified so as to affect the title conferred on the proprietor by registration, unless such proprietor has caused or substantially contributed by his act to the mistake in consequence of which rectification is sought.

Now apply this to the present case. The plaintiff company has by its own act, that is, by the registration of a conveyance, which by itself is inoperative to pass the pieces of land in dispute, caused the mistake; that is, the inclusion of the pieces of land in dispute in the registered title, and it is in consequence of that mistake that the defendant, Mrs. Lyall, seeks rectification. Again, I think that sub-para. (*c*) is also material; that is the sub-paragraph which says: "Unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against the registered proprietor." If, as I have held to be the case, Mrs. Lyall was in fact entitled to the fee simple of the two pieces of land in dispute immediately before the registration, and the registration has in fact taken place, as I hold it has, without her assent or knowledge, and she has against her will and in ignorance of what has happened, been deprived of that fee simple, it would in my view, be manifestly unjust not to rectify the register, and the case falls within sub-para. (*c*) as well as within sub-para. (*a*). In this connection, it is worthy of notice that under s. 144, sub-s. 1, power is given to make rules which by sub-s. 2 of the same section, are to have the same force as if enacted by the Act. The rules made under this section include two rules, 13 and 14, which give the registrar power to rectify the register. Rule 13 applies substantially to clerical errors, but r. 14 is in these terms : " Where it is proved to the satisfaction of the registrar that the whole of the land comprised in a title, or too large a part to be properly dealt with under the last preceding rule, has been registered in error, the registrar may enter notice of that fact in the register," and then he may cancel the registration under certain circumstances and with certain safeguards. There is no doubt that under r. 14, the registrar has express power to rectify where there is an error in the registration owing to a mistake, and no limitation is placed on that power.

It was argued by Sir Thomas Hughes that by reason of the provisions of s. 147 of the Act of 1925, the power of rectification conferred by s. 82 did not apply to the first registration of land under the Land Transfer Acts of 1875 and 1897. Sect. 147 provides for the repeal of the Land Transfer Acts, 1875 and 1897, and by sub-s. 1, sub-para. (*a*), it is provided that : " Nothing in this repeal shall, save as otherwise expressly provided in this Act, affect any transfer of any interest in land or entry in the register made before the commencement of this Act, or any title or right acquired or appointment made before the commencement of this Act."

The power to rectify conferred by the Act of 1925 is an express power. Any rectification made under the power in the Act of 1925 is made possible, not because the old Acts or either of them have or has been repealed, but by reason of the fresh power conferred by the new Act ; and in my judgment there is no basis for the argument that the power of rectification is in any way dependent on the repeal of the Land Transfer Acts, 1875 and 1897, or either of them.

In my judgment, on the true construction of the Land Registration Act, 1925, there is ample power to direct the rectification of the register in the present case, and on the facts found by me I order that the register be rectified by the omission from the filed plan of the Northern Shaw and that part of the Sheepwalk Shaw to the east of the ditch. The exact parts to be omitted from the filed plan are the whole of the Northern Shaw, between the points marked post 8 and post 9 respectively on the plan "H. C. L. 1"; and that part of the Eastern Shaw which is shown on the plan "G. M. 1" as lying to the east of the dotted line shown on that plan, running from boundary post No. 9, to the iron stanchion at the southern end of the Sheepwalk Shaw.

In the result the counterclaim succeeds, and as a necessary consequence of that, I think the action fails. In those circumstances, I dismiss the action with costs to be paid by the plaintiff company to the defendant, and I order the plaintiff company to pay the defendant's costs of the counterclaim.

Solicitors: *Corsellis & Berney; Routh, Stacey & Castle, for Thring, Sheldon & Ingram, Bath.*

A. R. T.

EVE J.
1929
Nov. 6;
Dec. 10, 20.

In re MILLS.

MILLS *v.* LAWRENCE.

[1929. M. 2125.]

Power—Release—Testamentary Power of Appointment to any Member of a Class—Selection of Object specially qualified in Opinion of Donee—Trust for Donee in Default of Appointment—Power coupled with Duty—Invalidity of Release—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 155.

A testator by his will directed the income of his net residuary estate to be accumulated for a period of twenty-one years from his death, and subject to certain trusts in favour of an infant grandson and his issue which failed owing to the death of the grandson, declared that the trust fund and all statutory accumulations of income were to be held upon such trusts for the benefit of all or any one of the children and remoter issue of the testator's father, who in the opinion of the testator's brother, one of the two trustees of the will, should evidence an ability and desire to maintain the family fortune by replacing the sums of which it had been depleted by death duties and other taxation, as the testator's brother should by any deed revocable or irrevocable appoint, and in default of such appointment in trust for the brother absolutely:—

Held, that the power being one coupled with a duty—namely, a duty to the testator to maintain and restore the family fortune—was

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incapable of release, and a purported release by the donee was therefore invalid.

Weller v. *Ker* (1866) L. R. 1 H. L. Sc. 11 and *In re Eyre* (1883) 49 L. T. 259 applied and followed.

ORIGINATING SUMMONS.

By his will dated May 24, 1922, the Hon. Algernon Henry Mills appointed his brother, the Hon. Egremont John Mills, the plaintiff, and his brother-in-law, General the Hon. Sir Herbert Alexander Lawrence, to be executors and trustees thereof, and after making various specific bequests and bequeathing certain annuities, and a reversionary legacy to a grand-daughter, devised and bequeathed all his real and personal estate, not otherwise disposed of, unto his trustees upon trust for sale and conversion, and after payment thereout of funeral and testamentary expenses, death duties and debts and payment or provision for legacies and annuities, directed his trustees to invest the residue and to hold the investments and the income thereof upon trust to accumulate the annual income by way of compound interest for a period of twenty-one years, and after the expiration of that period to apply the income for the maintenance, support, or benefit of his grandson, Henry Algernon Seymour Mills, or his wife and issue for the time being as the trustees should in their absolute discretion think fit, and after the death of his grandson and subject to the trust for accumulation the trust fund and the income thereof were to be held upon certain trusts for the issue of the grandson (which failed). And subject to the above trusts and powers the trust fund and all statutory accumulations of income were to be held upon such trusts for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of the testator's father, " who in the opinion of my said brother evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it has been despoiled by death duties and other taxation, as my brother the said Egremont John Mills shall by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for my said brother absolutely."

By clause 15 of his will the testator bequeathed all reversionary interests to which he was entitled in the heirlooms given to him by the will of his father, the late Lord Hillingdon, upon such trusts as his brother, the plaintiff, should appoint to or for the benefit of all or any of the children, issue or other descendants of his (the testator's) father, provided that his brother should be entitled to appoint under the power to his own issue, but not to appoint more than a life interest for his own benefit.

The testator died on October 21, 1922, and probate of his will was granted to the executors, the plaintiff, and the defendant Lawrence, on January 8, 1923.

The testator's father, the first Lord Hillingdon, had ten children, of whom four were still living at the date of the testator's death. There were also several grandchildren and great-grandchildren then living. The testator's grandson, Henry Algernon Seymour Mills, died on April 1, 1928, an infant, and without having been married.

By an appointment dated June 13, 1928, the plaintiff appointed that after the determination of the trust for accumulation and after the death of the survivor of himself and his wife, the trustees should raise 15,000*l.* out of the trust fund for two nieces of the testator, Sylvia Caroline Watts Russell and Elizabeth Barbara Abel Smith, and subject thereto that the trust fund should be held in trust for such of them, Algernon Victor Mills and Geoffrey Edward Mills, nephews of the testator, as attained the age of twenty-one years and should then be living. The plaintiff thereby retained power to revoke or vary this appointment, and by a deed of revocation dated June 18, 1929, he revoked the appointment and released the trust fund from the power to the intent that the power should be absolutely extinguished.

The summons was taken out to determine the questions: (1.) whether having regard to the release of the power of appointment the plaintiff was absolutely entitled to the property; (2.) if the release did not vest the property in the plaintiff, whether the plaintiff could validly appoint in favour of himself the whole or any part of the property; and (3.) if the release had not the aforesaid effect whether the plaintiff was under any obligation to exercise revocably or irrevocably the power of appointment. After being part heard the summons was adjourned to enable the nephews and nieces taking under the revoked appointment of 1928 to be added as defendants, and was then reargued.

C. A. Bennett K.C. and *Cleveland-Stevens* for the plaintiff. The power of appointment is one capable of being released, and the plaintiff has effectually released it by the deed of revocation. The fact that the plaintiff by releasing it has conferred a benefit upon himself does not prevent the release from being valid. The case is covered by the decision of the Court of Appeal in *In re Radcliffe* (1), followed by that of Chitty J. in *In re Somes* (2), distinguishing *In re Eyre.* (3) This is not a power in the nature of a trust or coupled with a duty, as in the latter case. Nor can it be suggested that a release by the plaintiff would be a fraud upon the power, as was the case in *In re Jones' Settlement* (4) and *Shirley* v. *Fisher.* (5)

Here the testator has given the property to the donee if he does not exercise the power. If he is entitled to release the power, the question is whether he can make himself absolutely entitled to the residue, by appointing to himself as one of the objects of the power. The power was not given to both trustees, but only to the plaintiff, and is therefore not vested in him as a trustee. Clause 15 of the will restricted the power of the plaintiff to appoint the Hillingdon heirlooms to himself for life only, the inference is that there is no such restriction as regards the trust fund and accumulations.

H. F. F. Greenland for the defendant Lawrence. This is a power coupled with a duty to carry out the intentions of the testator, and to select the object, in the opinion of the plaintiff, most likely to restore the depletion of the family fortune by continuing the accumulation of income. The power must last as long as the plaintiff lives, and his duty is

(1) [1892] 1 Ch. 227.

(2) [1896] 1 Ch. 250.

(3) 49 L. T. 259.

(4) [1915] 1 Ch. 373.

(5) (1882) 47 L. T. 109.

not to preclude himself from making an appointment to some member of the family who ultimately, after the expiry of the period of twenty-one years, may turn out to have the requisite qualifications. The case is covered by *Weller* v. *Ker* (1), a decision of the House of Lords, and *In re Eyre.* (2) The latter was a case of a perfectly general power of appointment vested in a trustee, and Kay J. held that it could not be released or destroyed. It would be a breach of duty for the plaintiff to appoint to himself, as that would involve the estate in heavy death duties upon his own death, which was exactly what the testator desired to avoid.

Gavin Simonds K.C. and *A. Guest Mathews* for the nephews and nieces, appointees under the revoked appointment. The power is one coupled with a duty, and therefore cannot be released. Before 1882 the question whether a power, coupled with an interest, could be released, was much debated, but by the Conveyancing Act, 1881, s. 52, it was enacted that a person to whom any power whether coupled with an interest or not was given could release or contract not to exercise the power. That section is reproduced in s. 155 of the Law of Property Act, 1925. But notwithstanding the generality of the words it has always been held that the section does not apply to a power coupled with a duty. In *Coffin* v. *Cooper* (3) Kindersley V.-C. said that in the absence of authority he would have decided the case upon certain broad principles, one being that a power to appoint among children was a power in the nature of a trust, but that general principles had been broken in upon by authorities. Although those general principles have been encroached upon, they have not been destroyed. In no case has it been held that such a power can be released for the benefit of the donee except where he had a life interest in the property subject to the power. The present case does not come within the usual category of powers. The object of the power was not the benefit of the members of the family or any of them so much as the preservation of the family fortune. The power

(1) L. R. 1 H. L. Sc. 11.
(2) 49 L. T. 259.
(3) (1865) 2 Dr. & Sm. 365.

is given to the plaintiff as one of the two trustees, and is one in the nature of a trust: *Weller* v. *Ker* (1); *Saul* v. *Pattinson* (2); *In re Eyre.* (3) The distinction between the two classes of powers, those coupled with a duty and those not so coupled, is shown in *In re Somes.* (4) There is nothing in that decision to conflict with the cases we rely on, if this is a power coupled with a duty, and Chitty J. definitely distinguished the two latter: Farwell on Powers, 3rd ed., p. 12; and Chance on Powers, 1831, ch. xxiv., p. 577.

[EVE J. referred to *In re Evered.* (5)]

In that case the donee of the power had a life interest in the property, and the question was what was the legal effect of a covenant not to appoint less than a certain sum to each child. The power here is one purely collateral under the old classification. Subject to the interest of his grandson who died in infancy, the testator desired his property to be increased by accumulating the income for as long as possible before it passed finally to any member of the family.

Cleveland-Stevens replied.

Cur. adv. vult.

Dec. 20. EVE J. By his will dated May 24, 1922, the testator, The Hon. Algernon Henry Mills, appointed his brother, the plaintiff, and his brother-in-law, the defendant, General The Hon. Sir Herbert Alexander Lawrence, to be his executors and trustees. He died on August 21, 1922, and in the events which have happened the trustees stand possessed of his residuary estate upon trust (for the purpose of replacing the heavy sums of death duties and other taxes payable on his death in respect of his estate or which he had discharged in his lifetime) to accumulate in the way of compound interest the annual income of the trust fund for a period of twenty-one years from his death by investing the same and the resulting income thereof as in his said will mentioned and so that all accumulations so made should be added to the capital of

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(1) L. R. 1 H. L. Sc. 11.

(2) (1886) 55 L. J. (Ch.) 831; 34 W. R. 561.

(3) 49 L. T. 259.

(4) [1896] 1 Ch. 250.

(5) [1910] 2 Ch. 147.

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the trust fund and should thereinafter be included in the description of the fund. And subject to such trust for accumulation, upon trust for such purposes generally for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of his, the testator's, father who should in the opinion of the plaintiff evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it had been despoiled by death duties and other taxation, as the plaintiff should by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for the plaintiff absolutely.

The question is whether this power of appointment is one which the plaintiff can determine by releasing it; in other words, is it or is it not a power coupled with a duty? If it is so coupled then, although it is not a trust inasmuch as there is no one who can enforce the execution of it, it is in the nature of a trust and cannot be released. If, on the other hand, it is not coupled with a duty it may be released even though the release be for the sole benefit of the donee: *In re Radcliffe* (1) and *In re Somes.* (2)

I am of opinion that it is a power coupled with a duty; the donee is a trustee of the will, and the testator has made his wishes and intentions abundantly manifest. The income of the trust fund is to be accumulated for the full statutory period, the testator obviously hopes that some member of the class may be found to prolong the process of accretion, and he commits to the plaintiff the power to select from the class the individual or individuals who in his judgment evidence an ability and desire to maintain the family fortune by the capital recoupment he indicates. It is impossible to believe that he ever intended or contemplated that the plaintiff could at any time after his death by releasing the power or exercising it in his own favour constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation. His intention was that the power should be retained and be exercisable at least down to the expiry of the primary trust for accumulation, he gave the power to the plaintiff for the benefit of those who formed the class from which he could select those who should become possessed of the fund increased by the accumulations, and I cannot accede to the view that in these circumstances the plaintiff is free to divest himself of the power or to do anything which will preclude him from exercising it hereafter.

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(1) [1892] 1 Ch. 227.

(2) [1896] 1 Ch. 250.

This conclusion is supported by the authority of the House of Lords in *Weller* v. *Ker* (1); of Pearson J. in *Saul* v. *Pattinson* (2); and of Kay J. in *In re Eyre.* (3) In the last mentioned case the testator directed that his trustees should hold one moiety of his residue in trust for such persons in such shares and generally in such manner as they should in their absolute discretion direct, limit and appoint and in default of appointment in trust for all his children living at his death in equal shares. After the testator's death one of the trustees executed a deed poll whereby he absolutely and for ever released the moiety subject to the power to the intent that thereafter such moiety might go and be held upon the trusts by the will declared in default of appointment. The learned judge in holding that the power still survived notwithstanding the purported release did so on the footing that the power was one coupled with a duty, that the testator intended that the donees should have power from time to time during their joint lives to modify the ultimate disposition of the moiety of his residue and that such a power could not be destroyed. From an early passage in his judgment I extract the following, which is, I think, peculiarly applicable in the present case: "A trustee who has a power which is coupled with a duty is, I conceive, bound, so long as he remains trustee, to preserve that power and to exercise his discretion as circumstances arise from time to time, whether the power should be used or not, and he can no more by his own voluntary act, destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him."

(1) L. R. 1 H. L. Sc. 11. (2) (1886) 55 L. J. (Ch.) 831; 34 W. R. 561.
(3) 49 L. T. 259.

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I must therefore answer each of the first three questions raised in the summons in the negative. The costs of all parties will be taxed as between solicitor and client and be paid and retained out of any moneys in the hands of the trustees representing capital or income of the residuary estate. (1)

Solicitors: *Murray, Hutchins & Co.; Bircham & Co.*

H. L. L.

C. A.
1929
EVE J.
Nov. 15; *Dec.* 3.
C. A.
1930
Jan. 21.

BOOSEY AND COMPANY, LIMITED *v.* GOODSON GRAMOPHONE RECORD COMPANY, LIMITED.

[1929. B. 4484.]

Copyright—Mechanical Reproduction of Music—Gramophone Records—Royalties—Adhesive Labels purchased from Owner of Copyright—Delivery of Records to Purchaser—Duty of Owner to supply "Adhesive Labels"—Onus on Maker to show Labels incapable of adhering to Contrivances sold—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2 (*d*); *s.* 19, *sub-s.* 2*—Copyright Royalty System (Mechanical Musical Instruments) Regulations,* 1912, *reg.* 4 (*a*) (*f*).

By reg. 4 of the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, made under the Copyright Act, 1911, royalties on gramophone records are payable by adhesive paper labels to be supplied by the owner of the copyright to the maker on his demand in writing and tender of the price equal to the amount of the royalty represented thereby. Subject to the Regulations, no contrivance is to be delivered to a purchaser until such label or labels denoting the amount of the royalty have been affixed thereto:—

Held, by Eve J., that the duty of the copyright owner under the Act and Regulations was to supply labels capable of adhering to any gramophone records which the maker proposed to produce, and that if, for any reason, the labels supplied refused to adhere to any particular type of record, such as a celluloid record, the maker was entitled to deliver his records unlabelled to the public without infringing the copyright.

Held, by the Court of Appeal (reversing the decision of Eve J.), that when the copyright owner had supplied a maker of gramophone records with "adhesive labels" within the meaning of the Regulations, the onus was on the maker to show that there were no means by which the labels could be made to adhere to the records. The words "adhesive labels" in the Regulations could not be construed by implication to mean that the labels should be fitted to adhere and capable of adhering to any substance of which the maker might choose to manufacture his records.

MOTION.

The plaintiffs, who were the owners of the copyright in a large number of musical works, brought this action claiming an injunction to restrain the defendants from selling and delivering to the public gramophone records made by them of musical pieces, the copyright in which was vested in the plaintiffs, until adhesive labels supplied by the plaintiffs and denoting the amount of the royalty paid by the defendants for the right of reproduction, had been affixed thereto. The defendants were manufacturers of gramophone records made of thin celluloid. Having given the prescribed notices they made records of music the copyright of which belonged to the plaintiffs, and were duly supplied by the plaintiffs with ordinary adhesive paper labels denoting the amount of the royalty to be affixed to the records. The defendants then discovered, as the fact was, that these labels refused to adhere to the celluloid records made by them. They offered to keep an account of the number of records sold, and to pay sums in advance on account of the royalties, but the plaintiffs refused this offer. The defendants then proposed to sell the records made by them unlabelled, and the plaintiffs commenced this action, claiming that to do so would be a breach of the Copyright Act, 1911 (1), and the Regulations (2) [see p. 450] made thereunder.

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(1) Reversed in C. A. [1930] W. N. 94.

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(1) Copyright Act, 1911, s. 1, sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . . . and shall include the sole right—

. . . . .

(*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered."

Sect. 19, sub-s. 1: "Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced. . . . ."

Sub-s. 2: "It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

"(*a*) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

"(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the

C. A. Bennett K.C. and *K. E. Shelley* for the plaintiffs. The plaintiffs have supplied the ordinary adhesive paper labels to the defendants, but it is said by them that these labels refuse to adhere to the celluloid records they are manufacturing, and therefore the defendants now refuse to purchase a further supply of labels, and threaten to sell the records unlabelled, if they have not already done so.

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work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned. . . . ."

Sub-s. 6: "For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties."

(2) The Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, provide:—

"Payment of Royalties."

Reg. 2: "The notice required by section 19 (2.) of the Copyright Act, 1911, shall contain the following particulars . . . . :

"(*c*) The class of contrivance on which it is intended to reproduce the musical work (e.g., whether discs, cylinders or music rolls). . . . ."

Reg. 4: "(*a*) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed in the manner provided by these Regulations.

"After the person making the contrivances has given the prescribed notice of his intention to make or sell the contrivances, the owner of the copyright shall by writing sent by registered post intimate to him some reasonably convenient place within the United Kingdom from which adhesive labels can be obtained and on demand in writing and tender of the price shall supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby.

"Subject to these Regulations no contrivance shall be delivered to a purchaser until such label or labels denoting the amount of the royalty have been affixed thereto, or in the case of cylinders, to which it is not reasonably practicable to affix the labels, until such label or labels have been affixed to a carton or box enclosing the cylinder.

"(*b*) In cases where royalties are payable by means of adhesive labels if at any time labels of the required denominations are not available either because—

(i.) after the expiration of five days from the date of the prescribed notice of the intention of the person making the contrivance to make or sell such contrivances the owner of the copyright has not duly sent to the person making the contrivances an intimation of some reasonably convenient place within the United Kingdom from which such labels can be obtained; or

Moritz K.C. and *Hon. S. O. Henn Collins* for the defendants. The defendants obtained a supply of gummed labels from the plaintiffs and affixed them as usual, but it was found that the labels invariably got detached before the records reached the dealers.

The duty of the plaintiffs, to enable the defendants to comply with the Act, is to discover and supply some kind of label which will adhere to celluloid. In the meantime the defendants undertake to stamp the records issued by them with a rubber stamp, to keep an account of records issued, and to pay sums on account of royalties in advance.

The plaintiffs have not said that they cannot make a stamp which will stick to our records, but it is admitted that the stamps hitherto supplied by them will not adhere.

The word "adhesive" in the Regulations is a relative term, it means "capable of adhering to the object which the manufacturer desires to produce." In respect to celluloid records therefore these are not "adhesive" labels.

Bennett K.C. replied.

Cur. adv. vult.

1929. Dec. 3. EVE J. The plaintiffs are the owners of copyright in a large number of musical works, many of which are from time to time recorded on gramophone records and other contrivances. By s. 19, sub-s. 2, of the Copyright Act, 1911, it shall be deemed not to be an infringement of copyright in any musical work for any person to make records, perforated

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(ii.) The owner of the copyright refuses or neglects to supply such labels within three days after demand duly made,
contrivances may be delivered to purchasers without having labels affixed thereto or to the carton or box enclosing the same; and the amount of royalties shall be a debt due from the person making the contrivances to the owner of the copyright and the person making the contrivances shall keep an account of all such contrivances sold by him."

"(*f*) The adhesive label supplied as aforesaid shall be an adhesive paper label, square in shape, the design to be entirely enclosed within a circle and the side of the label not to be greater than ¾ inch in length. . . . ."

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rolls, or other contrivances by means of which the work may be mechanically performed if such person proves (para. *b*) that he has given the prescribed notice of his intention to make the contrivances and has paid in the prescribed manner to or for the benefit of the owner of the copyright in the work, royalties in respect of all such contrivances sold by him, calculated at the rate thereinafter mentioned.

The defendants having given the prescribed notice of their intention to make the same, have recently manufactured records upon which are recorded musical works, the copyright in which is vested in the plaintiffs, and in the absence of any agreement to the contrary, the royalties in respect thereof are payable by means of adhesive labels purchased from the plaintiffs and affixed in manner provided by the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912. By reg. 4 (*a*) the owner of the copyright, after receipt of the prescribed notice, is to intimate to the person giving the notice some reasonably convenient place from which adhesive labels can be obtained, and on demand in writing and tender of the price, he is to supply from such place adhesive labels of the required denominations, at a price equal to the amount of royalty represented thereby, and (*b*) if at any time labels of the required denominations are not available, either because the owner of the copyright, (i.) has not, within the time therein mentioned, intimated some reasonably convenient place from which such labels can be obtained, or (ii.) refuses or neglects to supply such labels within three days after demand duly made, contrivances may be delivered to purchasers without having labels affixed thereto, and the amount of royalties shall be a debt due from the person making the contrivances to the owner of the copyright, and the former is to keep an account of all such contrivances sold by him.

The difference of opinion which has arisen between the parties, and for the solution of which this action has been instituted, is of this nature. The defendants are manufacturing and selling disc gramophone records made of celluloid. The adhesive labels supplied for many years past for affixing to records will not adhere to celluloid records—some interaction between the adhesive gum and the celluloid prevents them from so doing—and accordingly the defendants, after making various alternative suggestions not acceptable to the plaintiffs, demanded a supply of labels "having the property of adhering to the contrivances to which they are intended to be affixed," and intimated that, in default of such supply, the defendants would treat the same as a refusal or neglect to supply within para. (ii.) of reg. 4, cl. (*b*), and would, after the expiry of the prescribed interval, commence to deliver the records to purchasers without having labels affixed thereto, and keep an account of all such records sold by them.

Thereupon the plaintiffs issued the writ, whereby they claim an injunction to restrain the defendants from delivering to a purchaser any record by means of which any musical work, the copyright of which is vested in the plaintiffs, until a label or labels denoting the appropriate amount of royalty has been obtained from the plaintiffs and affixed thereto.

The point at issue is whether the plaintiffs are bound to supply labels which will adhere to the defendants' celluloid records; if they are, they have made default in not supplying them within the prescribed time after demand duly made, and the procedure threatened by the defendants would not, if adopted, be an infringement of the plaintiff's copyright. If, on the other hand, the plaintiffs are not so bound, the defendants cannot deliver unlabelled records to purchasers without infringing the copyright.

The Regulations directly contemplate that the owner of the copyright will supply the adhesive labels; the royalties are to be payable by means of "adhesive labels purchased from the owner of the copyright" (reg. 4 (*a*)); the latter is bound to intimate to the maker of the contrivance some reasonably convenient place whereat adhesive labels can be obtained, and on demand in writing, to supply from such place adhesive labels. If these provisions mean anything, they surely mean that the copyright owner is bound to supply a label capable of adhering to the particular contrivance

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which the maker of the contrivance proposes to use for the mechanical reproduction of the copyrighted work. For, be it observed, s. 19 of the Act contemplates other contrivances by means of which the work may be mechanically performed than records and perforated rolls, and except in the case of cylinders, to which it is not reasonably practicable to affix the labels, they must be affixed to the contrivance. Moreover (reg. 4 (*f*)) the adhesive label supplied as aforesaid shall be an adhesive paper label, which I construe as a paper label capable of adhering to the particular contrivance employed for mechanical production, and in respect of which the royalties are paid. In my opinion, the contention of the defendants is right. The Act imposes on the person making the record, or other contrivance, the burden of proving that he has paid in the prescribed manner to or for the benefit of the owner of the copyright royalties in respect of all the records or contrivances sold by him, for it cannot be that the Legislature contemplated that the copyright owner could —if so minded—withhold from him the means of evidencing those payments as prescribed by the Act.

The parties having agreed to treat the motion as the trial of the action I dismiss it with costs.

H. L. L.

C. A. The plaintiffs appealed. The appeal was heard on January 21, 1930.

Topham K.C. and *K. E. Shelley* for the appellants.

Moritz K.C. and *Hon. S. O. Henn Collins* for the defendants.

The arguments used in the Court below were in substance repeated.

Lord Hanworth M.R. This appeal raises an interesting little point in relation to the Copyright Act, 1911. The plaintiffs are Messrs. Boosey & Co., Ld., the well known music publishers, and we are told by a director of the company that the company owns a large number of copyrights of musical works, some of which are from time to time recorded on gramophone records and like contrivances. It is necessary, for the purpose of complying with the Copyright Act, that those who sell these contrivances should pay a royalty to those who are the owners of the copyright, and Mr. Leslie Arthur Boosey on behalf of the plaintiffs produces as exhibits to his affidavit the adhesive labels, which may be called small stamps, and a gramophone record to which a label has been affixed in the ordinary course, for under the Regulations these adhesive labels take the form of stamps. They are to be of a certain size, they are not to carry the Sovereign's head, they are to be square in shape, the design to be entirely enclosed within a circle, and there are details given with which these stamps which are produced to us are to comply; and an illustration of the way they have been used upon gramophone records is provided by this gramophone record that is exhibited to the affidavit. We are further told in the evidence that the plaintiffs have supplied similar adhesive labels for this purpose for upwards of fifteen years, and that the system of royalty payments by means of these adhesive labels, or stamps, has proved quite satisfactory throughout the whole of those fifteen years.

The defendants are the makers of a record, apparently a very beautiful one, which is made of celluloid, and they have found a difficulty in attaching this adhesive label or stamp, which has been in use during all these years, to this form of celluloid record. The fact that it is made of celluloid, I suppose, contributes to the result, which is that, except where the needle is operated, the record is in a highly polished state, and it is said by the defendants that they find a difficulty in attaching the adhesive label to their celluloid records.

In consequence of this difficulty, on October 9, 1929, a letter was written by the defendants' solicitors to the plaintiffs saying that they had read the Board of Trade Regulations—which I must deal with in a moment—and that it was the duty of the plaintiffs to supply adhesive labels; and then they continue: "We take this to mean labels having the property of adhering to the contrivances to which they are intended to be affixed." That is the attitude taken up by the defendants: "You, the plaintiffs, have to supply an adhesive which will adhere to the contrivances to which it is intended to be affixed; we are publishers of a particular record made of celluloid, we do not find that the labels adhere to it, and hence you, the plaintiffs, have not fulfilled your duty."

The letter goes on: "Our clients are therefore at liberty under Regulation 4 (*b*)"—to which I will refer in a moment—"to sell contrivances without labels affixed, and to keep an account of the contrivances which they sell." They therefore give notice that from and after October 17 "our clients will treat you as having neglected to supply labels and will deliver records to purchasers without labels and keep an account of those sold and will pay forthwith the amount so due."

The answer to that from the plaintiffs is: "The fact that your clients have chosen to make gramophone records of such a material that adhesive labels will not, as you allege, adhere thereto, does not entitle them to issue the records unstamped." That, quite shortly, but quite explicitly, shows what was the issue raised between the parties.

A further letter written by the plaintiffs' solicitors on October 12 states: "In order that there may be no misunderstanding we beg to give you notice on behalf of our clients, pursuant to the Regulations made by the Board of Trade under the powers conferred by section 19 (6.)" that adhesive labels for the payment of royalties "to which our clients may be entitled under the said Act in respect of contrivances of their copyright musical works made and sold by your company, can be obtained at their premises, viz., 295 Regent Street, W. 1."

Thereupon, as that issue had been defined and raised, what is understood to be a friendly action was commenced by a writ dated October 28, 1929, in which the plaintiffs asked for an injunction to restrain the defendants and their servants, and so on, from selling their records without first paying the appropriate royalty to the plaintiffs in the prescribed manner —that is, by affixing adhesive labels—and, further, an injunction against the defendants to restrain them from delivering to a purchaser any record to which a label has not been duly obtained and affixed thereto.

The action came on for trial before Eve J., and it was tried upon a motion for the injunction, that motion being treated as the trial of the action. There was evidence, which I have already referred to, of Mr. Boosey, and the evidence of Mr. Goodson on behalf of the defendants, which was that they had obtained some of these stamps, and that he affixed two stamps to the celluloid record, and that next morning when he opened the envelope in which the record had been enclosed, the two stamps had peeled off from the record and had fallen to the bottom of the envelope, thus proving, as the defendants would say, that these stamps were not suitable for the purpose of being affixed to, and that they would not adhere to, the celluloid gramophone record.

Again, there is further evidence that the defendants had 2000 of these stamps, of which 1925 were applied in the ordinary way—which I suppose was by moistening them—to records, " but I am informed by them (the recipients) and verily believe that the vast majority of the labels had been detached when the records reached them."

In reply the plaintiffs say that, so far as they know, in the course of their experience this is the first case in which it has been suggested that the labels manufactured by the plaintiffs will not adhere to records.

The upshot of that evidence appears to be this. The labels are treated by the defendants as being adhesive labels. They are so described. But it is said they are not adhesive labels that will adhere to the celluloid records; and the result is that the defendants say they are justified in selling the records without the labels, and keeping an account. The question is whether or not, under the Act and the Regulations made under the Act, that attitude of the defendants can be justified. Eve J. held that it could. His view was thus expressed in his judgment: " The point at issue is whether the plaintiffs are bound to supply labels which will adhere to the defendants' celluloid records " and he comes to the conclusion that the provisions—with which I must shortly deal—mean that the owner is bound to supply a label capable of adhering to the particular contrivance which the maker of the contrivance proposes to use for the mechanical reproduction of the copyright work.

From that decision an appeal is taken. It appears to me that the appeal must be allowed, and for reasons which are, to my mind, conclusive upon the terms of the statute itself and the Regulations made under it. To a large extent, if not entirely, the question turns upon the onus which lies upon the one side or on the other. As pointed out, copyright now depends upon s. 1 of the Copyright Act, 1911. But by s. 19 copyright is extended to mechanical instruments, which are now so largely in use. It says this: "Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced in like manner as if such contrivances were musical works." The persons who are making the records are prima facie infringing a copyright which is established in favour of the owner under s. 19 unless and until they comply with the duties which are imposed upon them. By sub-s. 2 of s. 19, where there has been some contrivance of the sort made, or where the consent or acquiescence of the owner of the copyright has been obtained to allow reproduction, then there is a right on the part of the person who intends to exercise it to make and sell these mechanical instruments subject to this, that he has given the prescribed notice of his intention to make contrivances and has paid in the prescribed manner to and for the benefit of the owner the royalties in respect of such contrivances sold by him.

I pause there for a moment. The owner of the copyright has that property preserved to him by s. 19. The person who is minded to reproduce by means of records and other contrivances can do so upon certain conditions; one is that he has to give a notice of his intention to make a contrivance, and a second is that he has to pay in the prescribed manner the requisite royalties. Regulations

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dated June 7, 1912, have been made and deal with this question of what is the prescribed manner in which the royalties are to be paid. A notice has to be given under that sub-s. 2 of s. 19 by the person intending to make the contrivances, and there is set out what the notice is to contain. It is observable that reg. 2 provides that the notice shall contain (inter alia) the following particulars: "(*c*) The class of contrivance on which it is intended to reproduce musical works (e.g., whether discs, cylinders, or musical rolls)." Thus the intending maker of the records must serve the notice, and the notice must include certain particulars as to the class of contrivance on which it is intended to reproduce the musical works.

It is noticeable, and I think Mr. Shelley's point is a good one, that there is no requirement that the nature of the substance which is to be used by the intending maker of the record must be stated in the notice. When, therefore, the notice is received by the owner of the copyright, he has no knowledge of the quality or substance of which the record is to be made. Reg. 4 deals with the payment of the royalties: "(*a*) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed in the manner provided by these Regulations"; and then the duty of providing these adhesive labels is thrown upon the owner of the copyright. He is to say where the adhesive labels can be obtained on demand in writing, and on tender of the price the owner is to supply from such place adhesive labels of the required denomination. Then, "Subject to these Regulations no contrivance shall be delivered to a purchaser until such label or labels denoting the amount of royalty have been affixed thereto, or, in the case of cylinders, to which it is not reasonably practicable to affix the labels, until such label or labels have been affixed to a carton or box enclosing the cylinder." Thus there is the duty, first of all, on the part of the intending maker to give notice of the contrivance which he is going to make; secondly there is the duty on the owner of the copyright to inform the maker where he can obtain the adhesive labels, and to supply adhesive labels at the proper price to the intending maker; thirdly there is the duty imposed upon the maker to affix those labels to the records unless what he makes is a cylinder, to which it would not be reasonably practicable to affix the labels. In that case he must put the cylinder into a carton or box and affix an adhesive label to the carton or box.

Then we come to para. (*b*) of reg. 4, which the plaintiffs and the defendants read with different results: "In cases where royalties are payable by means of adhesive labels if at any time labels of the required denominations are not available because . . . . (ii.) the owner of the copyright refuses or neglects to supply such labels within three days after demand duly made"—in that case, and in that case only, the maker may sell without affixing the adhesive label, and shall keep an account; in fact he may do what the defendants claim that they have now a right to do.

Now, is that so? I have pointed out that throughout the evidence, and the learned judge himself also uses the term, these stamps are called "adhesive labels." The words "adhesive labels" are to be used in their ordinary sense; they mean such labels as one would get in a shop if one asked for those well known articles used for the purpose of fixing on luggage or parcels or the like; and these stamps comply with the Regulations as to size and do adhere and have been proved to adhere to records during a period of some fifteen years. The owner of the copyright has not refused or neglected to supply them. He has supplied them; unless the defendants can impose upon the plaintiffs the duty to supply adhesive labels of such a character as will be suitable for adhesion to the substance of which the maker makes his record, but of which he does not give, and is not required to give, any specific notice to the owner of the copyright. It will be observed that throughout the Regulations the words used are "adhesive labels" simpliciter in their ordinary and common sense. In no case are there any words which indicate that what is to be supplied is a label that will be found to adhere to the material of which the contrivance is made. I do not find it possible to interpret "adhesive label" in the sense contended for by the defendants—namely, suitable for adhering to such material or substance as they may be minded to make their records from. The simple words are "adhesive labels" throughout; and these stamps that have been supplied are within the words of the Regulations, "adhesive labels."

I am not impressed by the terrible results which Mr. Moritz told us may follow or will follow from allowing this appeal. It appears to me quite possible that mechanically or chemically it would be possible to get over the difficulty that has occurred. The present records of the defendants are made without any interior circle such as is contained in other records which are made of shellac; and I can conceive that in a variety of ways it may be possible to overcome the difficulty with which Mr. Moritz rather threatened us. But whether that be so or not, the question is: On whom does the onus lie? It appears to me, after looking at the statute, that the owner has a copyright, and that the maker of the records has to justify himself by bringing himself within s. 19, sub-s. 2, and that in order to do so he has to give notice of his intention of making the contrivance and to pay the royalties in the prescribed manner. That can be done by affixing adhesive labels, or what are commonly known as adhesive labels; but in the event of the owner refusing or neglecting to supply such labels within three days after demand duly made, then and then only can the maker excuse himself from affixing them. To my mind the onus lies on the defendants to establish that the right has enured to them. Upon the facts of this case it appears to me that they have failed to discharge it. In my opinion therefore the plaintiffs are entitled to succeed and to be granted the remedy which they seek.

I will only add this, as it may be important, and I therefore give the same publicity to this fact as to the rest of my judgment: There is no possible suggestion that the defendants in this case were in any way attempting to evade payment of the royalties; all that they were seeking to do was to make use of the Act in a manner which was more convenient to the system which they adopted for their trade.

For these reasons the appeal must be allowed with costs here and below, and an order will be made in the terms of the writ, subject to any question that may arise when counsel address us on the point.

Lawrence L.J. Under s. 19 of the Copyright Act, 1911, the onus is on the defendants to prove that they have paid in the prescribed manner to the owner of the copyright royalties in respect of the records made and sold by them. The prescribed manner of payment is laid down by reg. 4 of the Regulations made under the Act in 1912.

Under that regulation the payment, unless otherwise agreed, is to be made by means of adhesive labels which are to be purchased from the owner of the copyright and affixed to the records; no contrivances are to be delivered to purchasers until such labels have been affixed thereto; the labels are to be adhesive paper labels, square in shape, the design to be entirely enclosed within a circle, and the sides of such labels are not to be greater than ¾ in. in length; if the owner of the copyright refuses or neglects to supply such labels within three days of the demand the makers are entitled to deliver the contrivances to purchasers without having affixed labels thereto.

In the present case the plaintiffs, on being applied to by the defendants, duly supplied 2000 adhesive labels of the type which they had during the last fifteen years been accustomed to supply to other manufacturers of records. The labels were accepted and paid for by the defendants, and it is not disputed that they were labels which are ordinarily known as adhesive labels. No complaint is made as to the size or shape of the labels or as to the material of which they were made. But it is said by the defendants that when they tried to affix the labels to their records in the usual manner they discovered that they would not satisfactorily adhere to the material of which their records were made, that material being celluloid, to which they allege that the ordinary adhesive label does not when moistened in the usual way adhere for any satisfactory length of time.

In these circumstances, the question is whether the labels supplied by the plaintiffs to the defendants were adhesive labels within the meaning of reg. 4, and the answer to that question depends upon whether the expression "adhesive labels" in the Regulations means what is ordinarily known as adhesive labels—that is to say, pieces of paper which have an adhesive substance, such as gum, on the reverse side, or whether it means that the labels must be such as will, on being moistened, firmly adhere to any substance of which any manufacturer may choose to make his contrivances. In my view the former is the right interpretation of the Regulations, which must be construed so that they may reasonably be acted upon.

It is important to bear in mind that the owner of the copyright has to supply the labels within three days after demand; and that he has no means of knowing or of compelling the maker to disclose the nature of the material to which they are going to be affixed, and that the only requirements laid down by the Regulations are that he is to supply adhesive labels made of paper of a certain shape and size. The term "adhesive labels" is obviously used in these Regulations as meaning labels in the nature of ordinary postage stamps. Each label is in the form of a receipt for the payment of the royalty, and the Regulations contemplate that it should be affixed to each record before delivery to a purchaser just as a postage stamp is affixed to a letter before it is posted.

Bearing these considerations in mind, I think that the true interpretation of the Regulations is that the adhesive labels which the owner of the copyright has to supply are paper labels having an ordinary adhesive material such as gum on the reverse side which when moistened will cause the label to adhere to any ordinary material to which paper labels are usually applied. I cannot think that it was the intention of the Legislature or of the Regulations that an owner of copyright should be bound to supply paper labels guaranteed to adhere to the surface of any kind of material of which a manufacturer might choose to make his records, otherwise it would be easy to escape the somewhat irksome duty imposed by the Regulations. It may very well be that the ordinary adhesive paper label will not satisfactorily adhere to celluloid; it may require some special adhesive substance to make paper labels adhere firmly to that material, though there is no evidence as to what that substance might be. The only obligation of the owner of the copyright under the Regulations is to supply adhesive labels, an obligation with which the plaintiffs in my opinion have complied. On the other hand, the obligation of the maker who is about to deliver records to a purchaser is, before such delivery, to affix one of such labels to each record. The onus is upon him so to affix it. In the present case I cannot find any evidence that there is any impossibility or real obstacle to so affixing it. The evidence points to the fact that when the whole record is made of celluloid it cannot satisfactorily be fixed directly on to the record by merely moistening the adhesive substance on the label; but that fact does not in my opinion discharge the onus which the Regulations impose upon the maker. There may be other material of which a record may be made, such as metal, to which an ordinary adhesive label would not adhere by merely moistening the reverse side of it. In all such cases I conceive it to be the duty of the manufacturer under the Regulations to devise some means by which an ordinary adhesive label can be affixed.

As the Master of the Rolls had pointed out, in the case of the shellac records which are in common use, a surface has been added in the centre to which an ordinary adhesive label will adhere; and, speaking for myself, I see no difficulty in a manufacturer of a celluloid record adding some materials to that record or to the adhesive label which will enable such label to be affixed satisfactorily to the record. It is not the function of the Court to point out how this may be accomplished, but the evidence has not satisfied me that it is impracticable or impossible. I quite appreciate that affixing adhesive labels to celluloid records may lead to extra expense and therefore be distasteful to the makers, but for the reasons I have stated it seems to me that if ordinary adhesive labels have been supplied by the owner of the copyright the maker cannot properly maintain that there has been a refusal or neglect to supply such labels because he finds a difficulty in affixing them to his records. The means of affixing the adhesive labels to the records is a matter which concerns the maker alone, and if he cannot affix them by ordinary means directly to the material of which his records are made, he must devise some other means by which such labels can be so affixed. For these reasons I agree with the Master of the Rolls that this appeal succeeds and ought to be allowed.

Romer L.J. I have arrived at the same conclusion although, I confess, not without considerable hesitation. The action is one brought by the owners of the copyright in certain musical pieces seeking an injunction to restrain the appellants from committing a threatened infringement of that copyright by the manufacture and sale of certain records for the reproduction of the music by mechanical means.

The subject-matter of copyright in such discs is regulated by s. 19 of the Copyright Act, 1911, and that section provides, by sub-s. 2: "It shall not be deemed to be an infringement of copyright in any musical work for any person to make"—I am leaving out immaterial words for the present purposes—"records, or other contrivances by means of which the work may be mechanically performed, if such person proves"—amongst other things—"(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him."

Now, the word "prescribed" in that section means prescribed by Regulations made by the Board of Trade. The Board of Trade did make Regulations as contemplated by the section. By reg. 4 (*a*) of those Regulations it is provided that: "Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed in the manner provided by these Regulations." The defendants have not proved that they have paid royalties by means of adhesive labels affixed in the manner provided by the Regulations. So far, therefore, the defendants in threatening to sell the records which they are making are threatening to commit an infringement of the plaintiffs' copyright.

But then the defendants refer to reg. 4 (*b*) of these Regulations which provides, so far as is material, as follows: "In cases where royalties are payable by means of adhesive labels"—this is one of those cases—"if at any time labels of the required denominations are not available" because, amongst other things, "the owner of the copyright refuses or neglects to supply such labels within three days after demand duly made, contrivances may be delivered to purchasers without having labels affixed thereto." The defendants say that the plaintiffs have refused or neglected to supply such labels—which means adhesive labels—within three days after demand. It appears to me that the onus must be upon the defendants of establishing that contention. It is for them to show that the plaintiffs have not supplied them with adhesive labels within the meaning of the Regulations. Now, they attempt to discharge that onus in this way. They say it is true that the plaintiffs have supplied them with certain labels, which indeed one of their witnesses described as "adhesive labels," but, they say: "We have tried to affix these labels to our records and we have found that in the majority of cases the labels have come off after a lapse of sometimes a few minutes and sometimes of a few hours."

The first question that seems to emerge is, what is the meaning of the phrase "adhesive labels" as used in these Regulations. I agree with Mr. Moritz's argument that the word "adhesive" wherever used is a relative term, and we must find out before we can say what is its meaning what are the things to which the labels have to adhere.

Then arises the question, What are those things? For that purpose I again turn back to the Regulations, and I find this, that the Regulations prescribe, as they had to prescribe, not only the manner in which the royalties were to be paid, but what was to be contained in the prescribed notice of the manufacturer's intention to make the contrivance. Reg. 2 as regards the notice provides that it is to contain, amongst other things, a statement of " (*c*) The class of contrivance on which it is intended to reproduce the musical work (e.g., whether discs, cylinders, or music rolls)." I further find that under the Regulations, unless after the expiration of five days from receiving the prescribed notice the owner of the copyright duly sends to the proposing manufacturer an intimation of some reasonably convenient place within the United Kingdom from which the labels can be obtained, or if the owner of the copyright refuses or neglects to supply such labels within three days after demand duly made; the manufacturer is relieved from the responsibility of affixing labels to the goods before delivering them to a purchaser.

Having regard to those Regulations it seems almost impossible to suppose that the Regulations intended the owner of the copyright to provide such a label as was capable of being affixed to any material which the manufacturer thought fit to use. It seems to me much more reasonable to suppose that the Regulations intended that the owner of the copyright discharged the obligations imposed upon him if he supplied a label which was reasonably capable of being affixed to the class of contrivance which had been mentioned in the notice given by the manufacturer to the owner of the copyright.

As was pointed out by Lawrence L.J., the owner of the copyright has no means of ascertaining, at any rate so far as the notice is concerned, of what material the manufacturer proposes to make his contrivance; and it would be impossible for him, or might be impossible for him, within the five days or the three days to provide a label capable of being affixed to the material which the manufacturer

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has decided to employ. It seems to me much more reasonable to regard the Regulations as imposing upon the owner of the copyright merely this obligation—namely, the obligation of supplying a label which is reasonably capable of being affixed, say, to a disc, and when once he has done that, if the manufacturer wishes to escape an infringement of copyright the obligation lies upon him of so constructing his disc that whether it be made of shellac or whether it be made of celluloid or whether it be made of anything else the label supplied by the owner of the copyright can be affixed. It is there where I think the defendants have failed to discharge the onus that lies upon them. I am not in any way satisfied that the defendants cannot affix to their discs, although made of celluloid, the labels supplied by the plaintiffs. It must be perfectly possible, as it seems to me, so to construct their discs, although they be constructed in the main of celluloid, that the labels supplied by the plaintiffs can readily be affixed. For these reasons I agree that this appeal must be allowed.

Appeal allowed.

After some discussion the order was made in the following terms:

"Declare that the defendants are not entitled to deliver to any purchaser any records or other contrivances by means of which music may be mechanically performed without a label denoting the appropriate amount of royalty obtained from the plaintiffs having been affixed thereto. Liberty to apply for an injunction."

Solicitors for plaintiffs: *Syrett & Sons.*
Solicitors for defendants: *W. H. Speed & Co.*

W. I. C.

In re WALKER.

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[1929. W. 1526.]

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Jan. 24.

Will—Construction—Words of Futurity—Residuary Gift to Children of Child of Testator "who shall die in my lifetime"—Child dead at Date of Will leaving Issue—Whether Issue entitled to Parent's Share.

The primary meaning of "shall die" in a will is "shall hereafter die." In the absence of some context to indicate a contrary intention it cannot be construed as equivalent to "shall have died" or "shall be dead," so as, in an original or substitutional gift to the issue of a child or other person who "shall die," to let in the issue of one who was already dead at the date of the will.

A testator by his will directed that after the death of his wife his trustees were to stand possessed of his residuary estate for all his children in equal shares "provided nevertheless in case any child of mine shall die in my lifetime leaving issue living at my death such issue shall stand in place of such deceased child, and shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me." One of the testator's sons died three weeks before the date of the will, leaving one child, a daughter, surviving him, and these facts were known to the testator when he made his will:—

Held, by Eve J. and the Court of Appeal, that there being no context in the will, such as a gift to children who "shall attain the age of twenty-one years," the word "shall" must be strictly construed as referring to the future only, and therefore the daughter of the deceased son was not entitled to any share in the residuary estate.

In re Cope [1908] 2 Ch. 1 followed.

Loring v. Thomas (1861) 1 Dr. & Sm. 497; *Gorringe* v. *Mahlstedt* [1907] A. C. 225 and *Barraclough* v. *Cooper* [1908] 2 Ch. 121*n.* discussed.

ORIGINATING SUMMONS.

The testator, Benjamin Walker, late of 291 Burley Road, Leeds, by his will dated September 27, 1920, appointed his son Frederick Arthur Walker and his daughter Florence Maud Walker (the plaintiffs) to be trustees and executors thereof, and after certain pecuniary legacies and specific directions with regard to the disposal of his business of manufacturer's agent the testator gave all the rest and remainder of his real and personal estate to his trustees upon trust to convert and after payment thereout of his debts funeral and testamentary expenses to invest the residue and to pay the income to his wife Jane Frances Walker during her life with the addition of a weekly sum of 5*l.* to be paid out of capital and after the death of his wife the testator directed his trustees to stand possessed of his residuary estate for all his children in equal shares subject to the following proviso: "Provided nevertheless in case any child of mine shall die in my lifetime leaving issue living at my death such issue shall stand in place of such deceased child and shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me."

The testator died on November 13, 1920, without having revoked or altered his will, which was proved by both executors in the Wakefield District Registry on January 12, 1921.

The testator's widow and tenant for life, Jane Frances Walker, died on January 6, 1922.

The testator was married once only—namely, to the said Jane Frances Walker (then Jane Frances Cullingworth), and there was issue of such marriage seven children—namely, four sons and three daughters.

One of the testator's sons, Benjamin Cullingworth Walker, predeceased him, and died on September 5, 1920, leaving issue one child only—namely, the defendant Hilda Walker, who was born on September 4, 1907.

At the date of his will—namely, September 27, 1920, the testator was aware of the death of his son Benjamin on the above mentioned date, and that his said son had left an only child—namely, the defendant Hilda Walker.

The plaintiffs as trustees on the death of the testator's widow distributed the deceased's estate (save the share now the subject of the summons) on the advice of their then acting solicitor, and they were not advised of any doubt or circumstances rendering it unwise for them to pay the share which Benjamin Walker would have taken had he survived the testator to the defendant Hilda Walker, nor were they advised of any doubt or circumstances rendering it unwise for them

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to pay this share to the defendant Hilda Walker, or that it was a matter upon which the opinion of counsel or of the Court should be taken.

Upon the defendant Hilda Walker attaining the age of twenty-one years, the trustees were advised that there was some doubt on the construction of the will.

The summons to which Emma Louise Walker, one of the testator's daughters, and Hilda Walker were made defendants was taken out by the plaintiffs as trustees to determine the question whether upon the true construction of the will and in the events which had happened the defendant Hilda Walker was entitled to the share in the residuary estate of the testator which her father Benjamin Cullingworth Walker would have taken if he had survived the testator.

Thomas Perks for the plaintiffs.

G. D. Johnston for the defendant Hilda Walker. The question is whether the words in this will "shall die in my lifetime" apply to a child Benjamin Walker who predeceased the testator so as to let in his issue, and it is submitted that they do. The word "shall" is not necessarily expressive of futurity in a gift of this nature, it equally imports condition so as to be equivalent to "shall or shall have": *In re Williams* (1), per Buckley L.J. *In re Cope* (2) is distinguishable on the facts. The present case is more like *In re Lambert.* (3) Since 1908 the whole trend of authority has been to widen the meaning of the word "shall." The expression "shall attain the age of twenty-one years" it is now settled includes a person who at the date of the will has already attained that age: *In re Rayner.* (4) The testator must have had in mind the fact that Benjamin had recently died.

F. Baden Fuller for the defendant Emma Louise Walker was not called upon.

EVE J. I think it is now well settled that in clauses of this nature, whether they be substitutional or original, the word

(1) [1914] 2 Ch. 61, 65.
(2) [1908] 2 Ch. 1.
(3) [1908] 2 Ch. 117.
(4) (1925) 134 L. T. 141.

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"shall" must be construed in its primary sense as a word of futurity, unless there is any context from which one can fairly come to the conclusion that the testator has used the word "shall" as equivalent to "shall or shall have done" this or that. The question is whether there is any such context here. For example, where a testator bequeaths gifts contingently upon children or grandchildren attaining twenty-one it frequently happens, as is shown by the authorities which have just been cited, that the bequests are so worded as to exclude from the class of beneficiaries children and grandchildren who have already fulfilled the contingency if the word "shall" be strictly construed, and in order not to attribute to the testator so capricious and unnatural an intention it has now been held that in such bequests the word "shall" is to be read as equivalent to "shall or shall have."

If therefore there was in this will any such bequest it would furnish a context, sufficient to justify me in construing the word "shall" in this proviso as "shall or shall have already"; but unfortunately for this child who has just attained her majority, there is no such bequest nor indeed is there anything in this will to impose on the word the meaning for which Mr. Johnston has contended.

I regret that it should be so, because in all probability if the testator's attention had been directed to the matter, he might have altered the expression he has used. I cannot say that the trustees were wholly unjustified in the construction they have hitherto placed upon the will, but it is impossible without departing from a well settled line of authorities, to give the meaning to this proviso which would carry a share of the residue to this child.

In those circumstances I must declare that she is not entitled to any share in the residuary estate.

H. L. L.

C. A.

The defendant Hilda Walker appealed. The appeal was heard on January 24, 1930.

Gover K.C. and *G. D. Johnston* for the appellant repeated in substance the arguments used on behalf of the appellant in the Court below and referred to the following authorities: *Loring* v. *Thomas* (1); *Barraclough* v. *Cooper* (2); *Gorringe* v. *Mahlstedt* (3); *In re Cope* (4); *In re Lambert* (5); *In re Metcalfe* (6); *In re Williams* (7); *In re Kirk* (8); *In re Brown* (9); *In re Rayner* (10); Theobald on Wills, 6th ed., p. 648; Ibid., 8th ed., p. 760.

F. Baden Fuller for the defendant Emma Louise Walker was not called upon to argue.

The trustees were not represented on the appeal.

LORD HANWORTH M.R. This is an appeal from Eve J., who had to give a decision as to the effect of a form of words in a clause which has often been considered by the Courts.

The facts are these. Benjamin Walker made his will on September 27, 1920, and died on November 13 of the same year. He left a widow and she was tenant for life of the whole estate, and he also left six children surviving him. One son had predeceased the testator, having died on September 5, 1920, that is, twenty-two days before the testator made his will. This son, Benjamin Cullingworth Walker, left a daughter, Hilda, who was born on September 4, 1907. The widow died on January 6, 1922, and upon her death it became the duty of the trustees to distribute the corpus of the residuary estate of the testator in accordance with the directions contained in the will. These were: "I direct that after the death of my wife my trustees shall stand possessed of my residuary estate for all my children in equal shares Provided nevertheless in case any child of mine shall die in my lifetime leaving issue living at my death such issue shall stand in place of such deceased child and shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me." It will be observed at once that the ultimate direction is to divide the estate amongst all the children in equal shares and the question raised is whether the grandchild Hilda Walker is entitled to stand in place of her father, Benjamin Cullingworth Walker, who was already dead when his father made his will. The words "in case any child of mine shall die" have a plain meaning. In using the words "shall die" the testator is using words of futurity. Is it possible to construe those words as equivalent to "shall have died" or "shall be dead"? If so, then Hilda is entitled to take her father's share, if not, then the condition imposed by the proviso is not fulfilled.

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(1) 1 Dr. & Sm. 497.
(2) [1908] 2 Ch. 121*n*.
(3) [1907] A. C. 225.
(4) [1908] 2 Ch. 1.
(5) [1908] 2 Ch. 117.
(6) [1909] 1 Ch. 424.
(7) [1914] 2 Ch. 61.
(8) (1915) 113 L. T. 1204.
(9) [1917] 2 Ch. 232.
(10) 134 L. T. 141.

We have had our attention called to a number of cases. The first is the well known case of *Loring* v. *Thomas.* (1) The passage to be construed there was: "In case any child or children of the said Dorothy Davies . . . . shall die in my lifetime, leaving any child or children who shall be living at my decease, and who shall live to attain the age of twenty-one years, then and in such case . . . . the child or children of each such child . . . . so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent, etc." Having read that clause the Vice-Chancellor goes on (2): "Now if the words 'shall die' must be construed to refer only to a future death, so as to exclude such children of Dorothy Davies as had died before the date of the will, then the words 'who shall live to attain the age of twenty-one years' must equally be construed to refer only to a future attainment of twenty-one years, so as to exclude such children of a deceased child of Dorothy Davies as had attained twenty-one before the date of the will." The Vice-Chancellor rejects that construction, and comes to the conclusion that "shall live to attain the age of twenty-one years" was not to be attributed to the case of a future event only, and that those children who had attained it before the date of the will were also to be included, and so the words "shall die" were to be construed upon the same footing. That case is really the root authority.

The next case is *Barraclough* v. *Cooper* (3), which, though decided by the House of Lords in 1905, did not find its way into the Law Reports until 1908, as a footnote to *In re Lambert.* (1) In that case the testator gave benefits to the issue of children who "shall have died in my lifetime or shall die after my decease in the lifetime of my said wife," and the question was whether those words should fall within the scope of the decision in *Loring* v. *Thomas* (2) so as to include the daughter of a child who had died before the date of the will. The judgment of the Court of Appeal was given by Romer L.J., and it was to the effect that the case was governed by *Loring* v. *Thomas* (2), because the Court found that there were words sufficient to negative the view that the testator intended nothing but futurity. In the House of Lords Lord Macnaghten in his judgment (3) quotes the following passage from Kindersley V.-C.'s judgment (4): "When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question, which of the two he intended, must of course depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both" and Lord Macnaghten adds: "That is exactly, I think, what the testator has done in this case." That is a case therefore in which the House of Lords, following the principle laid down in *Loring* v. *Thomas* (2), held that the words used were sufficient to prevent the necessity of giving to the word "shall" its narrow meaning of futurity.

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(1) 1 Dr. & Sm. 497.

(2) 1 Dr. & Sm. 497, 517.

(3) [1908] 2 Ch. 121*n*.

(1) [1908] 2 Ch. 117.

(2) 1 Dr. & Sm. 497.

(3) [1908] 2 Ch. 121*n*, 125*n*.

(4) 1 Dr. & Sm. 497, 510.

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In May, 1907, *Gorringe* v. *Mahlstedt* (1) was decided in the House of Lords after the decision in *Barraclough* v. *Cooper*. (2) In *Gorringe* v. *Mahlstedt* (1) a testator gave legacies to children of a son whom he described as "my deceased son Alfred William Gorringe." He gave his residue to his children who should be living at his death and attain twenty-one years, and then came a proviso: "Provided that in case any one or more of my children . . . . shall predecease me leaving any child or children living at my death then such child or children of my deceased child . . . . shall take and if more than one in equal shares the share which his her or their parent would have taken if such parent were living and over the age of twenty-one at my decease." In that case the House of Lords reversed the decision of the Court of Appeal from which Romer L.J. had dissented, and held that the children of the deceased son were not entitled to share. But the terms of the will there indicated that the testator had in mind that there was a deceased son, and there was a clear statement by the testator that he had not overlooked the fact that that son had died before the date of the will. No doubt was thrown upon the decision in *Loring* v. *Thomas* (3); but Romer L.J. in the Court of Appeal said (4) that words in a will must be taken in their natural signification, and he continued: "That is, to my mind, the natural meaning of the words on the language used, and there is absolutely nothing, to my mind, in this will which enables the Court to depart from the natural and first meaning of the words used." Lord Macnaghten, in the House of Lords, called attention to those words of Romer L.J. and approved of them, and he added (5): "In my opinion the gift in the proviso was simply a substitutional gift, not an independent gift to all the grandchildren." In my view it is clear that *Gorringe* v. *Mahlstedt* (1) would have been decided as it was, even if *Barraclough* v. *Cooper* (2) had been called to the attention of the House of Lords. I see nothing inconsistent between those two decisions of the House of Lords. I think that both cases really followed the lines of construction laid down by Kindersley V.-C. in *Loring* v. *Thomas.* (1) Since that time there have been a number of authorities, and I think that all the cases were really decided upon the same principle.

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(1) [1907] A. C. 225.
(2) [1908] 2 Ch. 121*n*.
(3) 1 Dr. & Sm. 497.
(4) Reported sub nom. *In re Gorringe* [1906] 2 Ch. 341, 350.
(5) [1907] A. C. 225, 228.

We have been referred to *In re Lambert* (2); *In re Metcalfe* (3); and *In re Williams.* (4) In all these cases it was decided that assistance was given to the Court by the context of the will, which enabled it to abstain from giving to the words "will" or "shall" a meaning of futurity only because, for instance, a proviso as to members of a class of persons taking a benefit on condition that they attain the age of twenty-one years applies also to those members of the class who may have attained twenty-one before the testator's death, and the existence therefore of such a clause enables the Court to discard the narrow meaning of the word "shall." But if there are no words giving the Court that assistance, the difficulty still remains, and in *In re Cope* (5) the Court of Appeal, following the same line of reasoning which I have endeavoured to state, decided that the persons entitled to share in a residuary gift did not include children of a child who was dead at the date of the will, because there were no words which enabled the Court to get away from the plain meaning of futurity implied by the words "shall die." In that case Cozens-Hardy M.R. said (6): "I think the only safe course in construing a will of this nature is to adhere to the natural and grammatical meaning of the words used, and I doubt whether much advantage can be gained by referring to authorities dealing with other wills in which similar language is used. Our duty is to ascertain the testator's intention from the language of his will." And later on he said (7): "I feel great difficulty in understanding how this proviso can be tacked on to, or have any bearing upon,

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(1) 1 Dr. & Sm. 497.
(2) [1908] 2 Ch. 117.
(3) [1909] 1 Ch. 424.
(4) [1914] 2 Ch. 61.
(5) [1908] 2 Ch. 1.
(6) Ibid. 3.
(7) [1908] 2 Ch. 5.

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the first proviso. Yet I think it throws some light upon the rest of the will. It contemplates, and it only contemplates, the death of a child *in the lifetime of the wife*, and it is scarcely possible to suppose that the death so contemplated was not a death subsequent to the date at which the will was executed. I cannot hold that the testator, who must be presumed to know which of his grandchildren were living, intended by these words to include a child whom he knew to be dead." I need not read any more. That is a decision which is binding on this Court, and it is a decision which re-affirms the duty of the Court to read and construe words according to their plain meaning, unless it can find that there are other words which negative the meaning of the narrow but plain words of futurity which have been used by the testator.

I can find no such assistance given to the Court here. It is difficult to suppose that at the date of this will the testator was not cognizant of the state of his family, and the will contains no such proviso as to children attaining twenty-one as is to be found in some of the cases. It seems to me that neither the will, nor the proviso, nor any surrounding circumstances give us any assistance to enable us to negative the plain words which the testator has used. Therefore the judgment of Eve J. was right, and the appeal must be dismissed.

LAWRENCE L.J. I agree. In my opinion it is firmly settled by authority binding upon this Court that the expression " shall die " must be given its primary meaning of " shall hereafter die " unless there is a context showing that the expression is not used in a strictly future sense. It seems to me that there is no such context in the present case.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *George A. Herbert, for Brooke & Dyer, Leeds; Gibson & Weldon, for T. W. Weldon, Leeds.*

W. I. C.

BARNES *v.* CADOGAN DEVELOPMENTS, LIMITED.

FARWELL J.

[1929. B. 4603.]

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Feb. 13, 14.

Vendor and Purchaser—Registered Title—Irrelevant Entry on Register—Purchaser's Claim to delete—Particulars of Sale—Alleged Innocent Misrepresentation—Purchaser's Claim to repudiate and recover Damages—Vendor's Counterclaim for Specific Performance—No real Misrepresentation—Meaning of word "Street."

On July 11, 1929, the purchaser bought Lot 2 at a sale by auction and paid a deposit.

The particulars of sale described Lot 2 as an unrestricted freehold, practically an island block, with four frontages to Little Orford Street and three other streets in Chelsea, the block forming an excellent building site, when the existing buildings came into hand.

On examining the vendors' registered absolute title the purchaser found Entry 7 in the Charges Register stating in effect that on the transfer of Lot 2 and other property to the vendors on May 23, 1929, by mortgagees selling under their power of sale in a mortgage of February 17, 1903, from Company A (the former owners), the vendors by way of indemnity to the mortgagees but not further or otherwise covenanted to perform the obligations of Company A under a deed of December 23, 1905, made between Company A and the Chelsea Borough Council and under a London County Council Order of December 12, 1905.

The deed of December 23, 1905, made in pursuance of a large building scheme by Company A provided for the stopping up (inter alia) of Little Orford Street and for making certain new streets, including a new transverse street bisecting Lot 2. The Borough Council were to obtain the necessary Closing Orders, and Company A wereto lay out the new streets at their own expense.

By their order of December 12, 1905, the London County Council on the application of Company A sanctioned the new streets subject to certain conditions including a condition that Company A should covenant to lay them out, and on December 21, 1905, Company A covenanted accordingly.

On July 10, 1906, on the Borough Council's application the justices made a Closing Order for Little Orford Street.

For financial and other reasons this part of Company A's scheme had not yet been proceeded with. Little Orford Street was still open; it was in fact repaired by the Borough Council; and at the date of the contract neither the vendors nor the purchaser knew of the Closing Order's existence.

On discovering Entry 7 the purchaser required the vendors to delete it from the Register and to obtain a release of the obligations, and, on their refusal, he issued a vendor and purchaser summons for a declaration that a good title was not shown.

On subsequently discovering the Closing Order he discontinued the summons and brought this action claiming a declaration that he was entitled to repudiate the contract, damages for breach, and return of the deposit.

The vendors denied any breach and counterclaimed for specific performance :—

Held, that as the title of the vendors and their mortgagee predecessors was paramount to the 1905 documents, so that they were not bound by Company A's obligations thereunder, and the vendors' covenant of indemnity was a mere personal covenant to indemnify the mortgagees against a non-existent liability, the purchaser was not entitled to require the removal of Entry 7 from the vendors' registered title, but must be satisfied with a clean transfer not referring to the indemnity, and it would be the Registrar's duty to omit any reference thereto in the purchaser's registered title.

Held, also, that the twenty-four years old Closing Order did not affect the title, but, if and so far as it was inconsistent with the particulars, merely raised a case of innocent misrepresentation, on which the purchaser could neither repudiate the contract nor recover damages, his only remedy being to resist specific performance.

Held, therefore, that the purchaser's action failed on both points.

Held, also, on the vendors' counterclaim for specific performance that there was in fact no misrepresentation in the particulars, as the word "street" even in London did not necessarily mean a public highway. There was therefore no ground for refusing specific performance.

WITNESS ACTION.

This was an action by a purchaser claiming a declaration that he was entitled to repudiate the contract, damages for breach, and return of the deposit.

The vendors denied any breach and counterclaimed for specific performance.

On July 11, 1929, the purchaser bought Lot 2 at an auction for 23,000*l.* and paid 2300*l.* deposit.

The particulars of sale described Lot 2 as an unrestricted freehold property, practically an island block, with four frontages of stated lengths to Cadogan Street, Rawlings Street, Little Orford Street, and Draycott Avenue, Chelsea, the block forming an excellent building site for residential or commercial property when the existing buildings came into hand.

Special Condition 4 provided that "Each lot is believed and shall be taken as correctly described and any incorrect statement, error or omission found in the particulars, sale plan or these conditions shall not annul the sale or entitle any purchaser to be discharged from his purchase, nor shall the vendors or any purchaser claim or be allowed any compensation in respect thereof."

On examining the registered title the purchaser found that on June 6, 1929, the vendors were registered as absolute owners of Lot 2 and considerable other property.

The Charges Register, however, contained an Entry No. 7 stating in effect that on the transfer to the vendors on May 23, 1929, by mortgagees selling under their power of sale in a mortgage of February 17, 1903, from the former owners hereinafter called Company A, the vendors with the intent of affording the mortgagees a full and sufficient indemnity but not further or otherwise covenanted to perform the obligations of Company A under a deed of December 23, 1905, made between Company A and the Chelsea Borough Council and under a London County Council order of December 12, 1905 (copies of which were filed at the Registry), so far as the same were subsisting and capable of taking effect and should be required by the Borough Council or the County Council to be carried out, and would indemnify the mortgagees in respect thereof. The entry stated that the land was subject to the covenant so far as it ran therewith and was capable of being legally annexed thereto.

This deed of December 23, 1905, was made in pursuance of a large building scheme by Company A. It provided for the stopping up (inter alia) of Little Orford Street and for making certain new streets including a new transverse street right across the middle of Lot 2 from Little Orford Street to Cadogan Street. The Borough Council were to obtain the necessary Closing Orders. The plans had been submitted to and approved by the Borough Council and the County Council. Company A were to lay out the new streets at their own expense. Little Orford Street was not to be closed until the new street across Lot 2 had been completed and thrown open as a highway.

By their order of December 12, 1905, the London County Council on the application of Company A sanctioned the new streets subject to certain conditions, including a condition that Company A should covenant to lay them out, and on December 21, 1905, Company A covenanted accordingly.

On July 10, 1906, the Justices of the Peace at the London Quarter Sessions on the application of the Borough Council made a Closing Order for Little Orford Street.

For financial and other reasons, including the war and the Rent Acts, this part of Company A's scheme had never been proceeded with. Little Orford Street was still open, and it was in fact repaired by the Borough Council.

On September 9, 1929, after seeing Entry 7 the purchaser's solicitors wrote to the vendors' solicitor asking for abstracts of the deeds referred to so far as they affected the property, or whether the position was that none of them affected the property.

On September 16 the vendors' solicitor replied that the vendors were not bound by those deeds, as they bought from mortgagees whose mortgage was prior to those documents to which the mortgagees were not parties.

On September 18 the purchaser's solicitors replied that if the documents did not affect the vendors or their title they should be deleted from the Register. As the vendors entered into the indemnity covenant it appeared to the writers that it was correct for the Registrar to refer to it, and that he would continue the reference in the purchaser's land certificate.

On September 19 the purchaser's solicitors sent in requisitions.

On the same day the vendors' solicitor wrote saying that he agreed that the documents ought to be deleted, but that the Registrar would not agree to this without the mortgagees' consent, which had not yet been obtained. The writer thought that the Registrar would continue the reference in the purchaser's land certificate, but as the documents were filed at the Registry and did not in fact affect the purchaser's title, he was not entitled to copies, and could maintain a similar position on a resale.

On September 20 the purchaser's solicitors wrote requiring Entry 7 to be removed from the Register before completion, and stating that they were not prepared to complete on any other basis.

On September 26 the vendors' solicitor replied referring to his reply to Requisition 16 to the effect that the documents did not affect the purchaser's title.

Requisition 16 delivered on September 19 was as follows: "The existence of the restrictions disclosed by Entry 7 in the Charges Register and of the Indenture of December 23, 1905, and the Order of December 12, 1905, were not disclosed to the purchaser before exchange of the contracts and the purchaser requires the vendors at their own expense to obtain an express release from the Chelsea Borough Council and the London County Council and from the vendors' predecessors in title and to cause this entry to be deleted from the Land Certificate before completion."

The reply dated September 26 was as follows: "As these documents are not binding on the purchaser there was no obligation to disclose them and the vendors cannot agree to obtain the release or to cause the entry to be deleted. The entry clearly states that the sale was in exercise of a power of sale conferred by a charge bearing date prior to these documents and the original vendors [i.e. the mortgagees] obviously cannot be under any liability to perform the obligations or have any legal liability to pass on."

On September 27 the purchaser's solicitors repeated Requisition 16.

Neither side had then heard of the Closing Order, and on October 10 the purchaser issued a vendor and purchaser summons based on Requisition 16. Before that summons came on the purchaser heard of the Closing Order, told the vendors thereof, discontinued the summons, and commenced the present action on November 4.

Sir Herbert Cunliffe K.C. and *Charles Harman* for the purchaser. There are two points now. The first point, originally taken on the vendor and purchaser summons, was that owing to Entry 7, not disclosed in the contract, the vendors had not a clean title on the Register. The purchaser asked for deletion of the entry and release of the obligations. The vendors replied that the obligations bound neither the vendors nor the purchaser, and refused to delete the entry. The blot on the vendors' title therefore remains on the Register, and it will probably be noted on the purchaser's land certificate if he completes. This is so objectionable, that the purchaser is entitled to repudiate and claim damages for breach of contract.

The second point is the Closing Order of 1906. That is not part of the title to Lot 2, but it greatly diminishes the advantages of the boundary described in the particulars. Lot 2 is not bounded by four streets, and is therefore not an island block or an excellent building site. Little Orford Street is simply part of the vendors' property with no public rights over it, and the Borough Council have no right to repair it.

The Closing Order was obtained by the Borough Council in pursuance of the 1905 agreement, the obligations of which agreement and of the London County Council order the vendors covenanted with their own vendors, by way of indemnity, to perform, and there is very little doubt that these powerful bodies will do their utmost to get all those obligations carried out.

In these circumstances the purchaser is entitled to repudiate the contract and claim damages for breach, which damages, not arising on a question of title, are not restricted by the rule in *Bain* v. *Fothergill.* (1) See Williams on Vendor and Purchaser, 3rd ed., p. 1022.

Gover K.C. and *Shufeldt* for the vendors. The text-book is dead in the vendors' favour, in addition to which Special Condition 4 precludes the purchaser from annulling the sale or claiming damages for an incorrect statement in the particulars, meaning of course an innocent misstatement.

As to the two main points. The point on Requisition 16 has been opened on the footing that the 1905 agreements in some way bind the land. But we take by paramount title—namely, under a power of sale in a mortgage made before

(1) (1874) L. R. 7 H. L. 158.

those agreements were entered into, to which agreements the mortgagees were not parties. Our covenant with them was a mere personal covenant of indemnity, against a non-existent liability. We consented to the entry in the Register, though of course the covenant does not bind the land.

The purchaser cannot interfere with our registered title. The point is one of conveyance, not of title. We must of course give him a clean assurance without any reference to the indemnity, and he will be entitled to be registered accordingly. If the Registrar is so misguided as to put any reference on the Register, that is not our concern. The purchaser must deal with the Registrar once he has a clean assurance from us. This part of the claim fails entirely. See the Land Registration Act, 1925 (15 Geo. 5, c. 21), s. 40; and Brickdale and Stewart-Wallace on that Act, p. 204.

Next as to the Closing Order. It was made for our predecessors' convenience and ought really to have been a diversion order, as explained in *Rolls* v. *St. George's Vestry, Southwark*, (1) But that does not matter. The soil at once vested in our predecessors as owners of both sides of the street, and as the Closing Order has not been acted on for twenty-four years the Court can presume rededication as a highway: Pratt on Highways, 17th ed., p. 316, note (*g*); Halsbury's Laws of England, vol. xvi., p. 78.

Our contract itself was a rededication. At all events we can rededicate on completion, and can expressly do so in our conveyance to the purchaser. We are the only persons who can enforce the Closing Order.

In these circumstances this part of the claim fails and should be dismissed with costs.

Then we counterclaim for specific performance. Our only duty is to give the purchaser a clean conveyance without referring to the indemnity covenant. That we are prepared to do. We are also prepared if necessary to rededicate the soil of Little Orford Street as a public highway, or to covenant to keep it open as such. We cannot of course make it repairable by the inhabitants at large, though it is so repaired in fact, but that we never represented.

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(1) (1880) 14 Ch. D. 785, 800.

In these circumstances there is no reason why the Court should refuse us specific performance.

Sir Herbert Cunliffe K.C. in reply. The Borough Council and London County Council are not here and unless the Court can in their absence declare that they have no conceivable rights against the land in respect of the covenant or the Closing Order, the vendors cannot give the purchaser a clean conveyance, and the title ought not to be forced on him.

Rededication can only be made under the London Building Act, 1894 (57 & 58 Vict. cap. ccxiii.), ss. 7, 8.

FARWELL J. [after stating the facts :] It is quite clear that the agreement of December 23, 1905, and the London County Council order of December 12, 1905, do not affect the vendors' title in any way. The Register entry makes it plain that the vendors purchased the property from mortgagees selling under a power of sale in a mortgage paramount to the title of the parties to the Borough Council agreement, and the vendors are not in any sense bound by it. Why they were willing to indemnify the mortgagees against a non-existing liability I do not know ; nor do I know why the Registrar entered notice of that indemnity on the Register. Prima facie I should have thought it ought not to have been entered. It does not affect the land, but there it is on the Register, and the purchaser of course is entitled on completion to an assurance with a clean title so that he can get himself registered as absolute owner without any reference to this indemnity.

But that is not what the purchaser has been asking. He has been requiring the vendors to get the notice of the indemnity deleted from their own title. He was not entitled to require that. The property registered in the vendors' names as absolute owners comprises a great deal of property in addition to that now sold to the purchaser, and on the conveyance or transfer to him the purchaser will be registered as absolute owner under a new title. I cannot believe that the Registrar will think it right to put any notice on that title of a covenant in the vendors' title, which is obviously a personal covenant and no more. The purchaser was therefore demanding something to which he was not entitled.

The vendors' attitude was a little unfortunate. Their solicitor took a view as to what the Registrar might do, which does not coincide with mine. It is of course the vendors' duty to assure the property to the purchaser with a clean title, so that the purchaser can say to the Registrar: "Register me as absolute owner with a clean title." If the Registrar will not do that he will not be doing what he is bound to do, and the purchaser will have his remedy.

If the vendors had said: "You are not entitled to require us to alter our registered title, but of course you shall have a clean assurance enabling you to get registered as absolute owner"; they would in my judgment have completely disposed of the purchaser's requisition. They did not however take this attitude, and the purchaser issued a vendor and purchaser summons for a declaration that they had not made a good title. In my judgment that summons, if proceeded with, could not have succeeded. The documents on which the objection to title was based do not affect the vendors' title in any way, and the objection was without foundation.

On completion the vendors must give the purchaser a clean assurance. The fact that the purchaser is apprehensive that they may not or are not prepared to do so is not a ground for saying that they have not made a good title, and on the materials before me I am satisfied that there is no foundation for any such assertion.

After the vendor and purchaser summons was issued the purchaser discovered the Little Orford Street Closing Order of July 10, 1906, obtained by the Borough Council in pursuance of their agreement with Company A. He thereupon abandoned the summons and commenced this action asking for a declaration that he is entitled to repudiate the contract, damages for breach, and return of the deposit.

The purchaser puts his case in two ways. First he says that the vendors have failed to make a good title, and on that ground he is entitled to repudiate and obtain damages for breach of contract. I have already held that that ground of action fails.

The other claim is a different matter. The purchaser says: "The property was sold to me with a frontage on four streets. One of those streets has ceased to be a street at all"—I will assume for the moment that that is the position—"The vendors cannot carry out their contract because they cannot convey a property with a frontage on four streets. There is therefore a breach of contract. I am entitled to repudiate, and to damages for breach, including damages for loss of bargain."

That is an ingenious, but unsuccessful attempt to evade the well established principle that one cannot claim damages for an innocent misrepresentation.

I do not in the least accept the view that this was a contract to sell this particular property and something else. It is a contract to sell the particular property described in the particular way, and it does not enable the purchaser to say: "But you cannot convey me that property, because it has not got some of the attributes described."

Let me illustrate what I mean. Suppose a vendor contracts to sell Blackacre to a purchaser. It turns out that the vendor has no title at all to Blackacre. The purchaser is entitled to refuse to complete and to claim damages for breach of contract.

The damages in such a case are however restricted by the rule in *Bain* v. *Fothergill* (1) to the cost of investigating the title, except in the one case where the vendor could make a good title if he chose, and does not take the necessary steps to do so. In that case only does the purchaser get damages for loss of bargain.

But if the vendor contracts to sell Blackacre, and states that it has certain advantages and the purchaser contracts to buy it, it is not a breach of contract on the vendor's part, if those advantages are absent. The vendor says: "Here is Blackacre. I will convey it to you." That carries out his contract. If the misdescription of Blackacre's advantages induced the purchaser to enter into the contract, he may have a remedy, but he cannot say: "I repudiate the contract and claim damages for breach." His only remedy is this. If the misrepresentation is innocent he may be in a position to ask the Court to refuse the vendor specific performance, as he was only buying on the footing that the representation was true. In such a case the Court will not enforce specific performance. But if the misrepresentation is innocent, the purchaser cannot recover damages. There has been no breach by the vendor. He can still sue on the contract. The only possible relief that the purchaser can get is the refusal by the Court to give the vendor specific performance.

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(1) L. R. 7 H. L. 158.

Of course if the misrepresentation is fraudulent, i.e., deliberately untrue, or reckless, other considerations arise. No man can be compelled to carry out a contract induced by fraud, and in such a case the purchaser is entitled to avoid the contract and to damages for fraudulent misrepresentation.

But that is quite a different matter. There is and could be no allegation of fraud here. It is an ingenious, but quite unsound attempt to turn an innocent misrepresentation (if it is a misrepresentation at all) into a breach of contract by saying that the vendors cannot convey the property they contracted to sell, because one frontage is misdescribed. The real truth is that if there is any misrepresentation at all, it is only a misrepresentation that might in certain circumstances have entitled the purchaser to resist specific performance, but it gives him no right whatever to repudiate the contract and claim damages for breach.

In these circumstances the purchaser's action fails on both points and must be dismissed with costs. On the question of costs, although the vendors may not have answered Requisition 16 in the happiest way, the purchaser was certainly asking for something to which he was not entitled, and I cannot penalize the vendors in any costs.

The vendors' counterclaim for specific performance has given me more difficulty. This Court does not, speaking generally, enforce a contract containing a misrepresentation of an important specific fact inducing the purchaser to enter into the contract. These particulars no doubt represented the property as an island block, surrounded on all four sides by streets, and from that point of view an excellent building site. It would be important for the purchaser to know whether there was a street frontage on all four sides, or only on three.

The Little Orford Street Closing Order of July 10, 1906, creates a little difficulty. The effect admittedly was that the street ceased to be a public highway and the soil vested in the owners free from any right, interest or estate in the highway authority. In this case the vendors' predecessors owned the land on both sides and the soil of the road vested in them under the well known presumption.

But the curious point is this—namely, that nothing has been done in respect of that twenty-four years old Closing Order. Little Orford Street is still Little Orford Street. It is still a public highway so far as appearances go, and so far as it is maintained by the Borough Council. The old Closing Order is the only indication that it is not still a public highway.

The vendors invite me to decide that Little Orford Street has been rededicated to the public and is now again a public highway. I do not propose to decide that in this action. It may or may not be so. It may be that the effect of the public using the way ever since the Closing Order, and its maintenance by the Borough Council, may be enough at some time or other to enable the Court to hold that it has been rededicated as a public highway. Even if that is so it will not follow that it is maintainable by the Borough Council or Highway Authority.

But what I have really to consider is whether there was any misrepresentation here at all, and if so was it a misrepresentation disentitling the vendors to specific performance ?

Now on the strict reading of the particulars there is no misrepresentation at all. The property is stated to front (inter alia) Little Orford Street. Little Orford Street is still there. You can walk or drive up it in a taxi. There is no allegation in terms that Little Orford Street is a public highway. It is suggested that on the true construction of the particulars I ought to construe the reference to a London "street" as a reference to a public highway. But I am not satisfied that that is necessarily so, and unless the particulars contain a definite misrepresentation I cannot refuse the vendors specific performance.

Moreover, assume that the particulars imply that the street is a public highway. That may be perfectly true now. Assuming rededication, it would be a public highway, even though not repairable by the Borough Council. It is impossible for me to hold that this is a misrepresentation justifying me in refusing the vendors specific performance.

Assume however that it was a representation that Little Orford Street was a public highway maintainable by the Local Authority. That would be a misrepresentation as matters turn out—an innocent misrepresentation, as admittedly neither party knew of the existence of the Closing Order at the date of the contract.

But if this is so, and this is not a public highway, what is the position? The position is that the soil is vested in the vendors as absolute owners. They could not possibly, as between themselves and the purchaser, do anything in the face of this contract, that would prevent the purchaser or his licensees or other persons using Little Orford Street as a means of access to the public highway at each end of it. To avoid any possible risk the vendors offer at the bar to enter into a covenant binding themselves and their successors in title to do nothing to obstruct the purchaser or his successors in title in the use of Little Orford Street as a way to the public highway at each end and to enter that covenant on the register.

That removes any real difficulty, because the value of Little Orford Street to the purchaser is that it gives access

FARWELL J.

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all along the street to the highways at each end, and as long as it is kept continually open for the purchaser and his successors in title, he is not really damnified even if it is not a public highway.

But I am not deciding the case on that ground. The ground upon which I decide the counterclaim is that there is no misrepresentation in these particulars. I am not prepared to say that the description " Little Orford Street " necessarily imports a public highway, still less that it imports a public highway maintainable by the Local Authority. It may well be that it is now a public highway though not maintainable by the Local Authority. In that case there is no question of misrepresentation at all, and in any case I do not read the description "Little Orford Street" as necessarily importing a public highway, and I only think that the vendors ought to covenant as they suggest in order to protect the purchaser as far as possible from any prejudice or loss that he might possibly suffer if the vendors' successors in title should in the future take steps to close Little Orford Street, because assuming the Closing Order to be still in force and effective I am satisfied that the only persons who could close this street are the vendors or their successors in title.

There will be an order for specific performance on the footing that the title has not yet been accepted, and the purchaser must pay the costs of the counterclaim.

Solicitors : *Digby & Co.; R. A. L. Broadley.*

G. R. A,

idered. GOLDBERG
DWARDS
[1950] 1 Ch. 247

BORMAN *v.* GRIFFITH.

[1928. B. 2887.]

MAUGHAM
J.

1929
Oct. 25, 28, 29, 30.

Easement—Way—Contract for Lease—Lease of adjoining Part of same Property—Road over one Part for Use of other Part—Way of Necessity—"Assurance of property or of an interest therein"—General Words—Real Property Act, 1845 (8 *&* 9 *Vict. c.* 106), *s.* 3—*Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 2 (v.)—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 62, *sub-ss.* 1, 2; 205, *sub-s.* 1 (*ii.*).

By an agreement in writing dated October 10, 1923, J. agreed to demise to the plaintiff The Gardens, "with the paddock, orchard, and adjoining gardens," for seven years from September 29, 1923. These premises were situate in a large park called Wood Green Park, and were not approached by any public road. The agreement did not expressly reserve any right of way to the plaintiff. In 1926, J. executed a lease to the defendant of The Hall, and the remainder of the park, for fourteen years from March 25, 1926. The Hall had previously been let to H., who had surrendered his lease. A carriage drive ran from a public highway called Silver Street, through Wood Green Park, by the side of the front door of The Gardens, and on to The Hall. At the date of the agreement of October, 1923, J. was constructing, and afterwards completed, an unmetalled way from Silver Street to the back of The Gardens: but after that date the plaintiff constantly used the drive. The defendant obstructed the plaintiff in his use of the drive. In an action by the plaintiff, claiming to be entitled to a right of way over the drive:—

Held, (i.) that an agreement for a lease exceeding a term of three years is not an "assurance of property or of an interest therein," within s. 205, sub-s. 1 (ii.), of the Law of Property Act, 1925, and therefore cannot be deemed to include the general words of s. 62 of that Act.

(ii.) That the tenant was in the same position as if the Court had granted specific performance of the agreement, i.e., in regard to rights of way, as if, before the coming into force of the Conveyancing Act, 1881, the property had been demised with no mention of rights of way; and that, in the circumstances, a demise to the plaintiff of a right to use the drive upon terms must be implied.

Walsh v. *Lonsdale* (1882) 21 Ch. D. 9 distinguished.

Wheeldon v. *Burrows* (1879) 12 Ch. D. 31; *Brown* v. *Alabaster* (1887) 37 Ch. D. 490; and *Nicholls* v. *Nicholls* (1899) 81 L. T. 811 followed.

Clark v. *Barnes* [1929] 2 Ch. 368 referred to.

ACTION.

By an agreement dated October 10, 1923, David John James (hereinafter called "the lessor") agreed to demise to Frederick Ernest Borman (hereinafter called "the lessee") a dwelling-house and premises known as The Gardens, Wood

Green Park, Cheshunt, Hertfordshire, "with the paddock, orchard, and adjoining gardens, having a total acreage of five acres or thereabouts, for seven years from September 9, 1923, at a yearly rent of 100*l*." The premises had originally formed part of the gardener's lodge belonging to a dwelling-house known as The Hall, and it was expressed in the agreement that the plaintiff acquired The Gardens for the purpose of carrying on business there as a poultry and rabbit farmer. The agreement did not reserve any right of way to him. From a public highway called Silver Street a carriage drive (hereinafter called "the drive") ran through Wood Green Park along a winding course, past the front door of The Gardens and then on to The Hall. The front door of The Gardens opened on to the drive, which was the natural way of approaching the house. At the date of the agreement the lessor was making an entrance from Silver Street to the back premises of The Gardens by cutting through a spinney and filling up a ditch. This way, which was never made up or metalled in any way, led through a field or paddock at the back of The Gardens. There was conflicting evidence at the hearing as to conversations between the lessor and the plaintiff in relation to this way and to the user by the plaintiff of the drive. The plaintiff, however, continued to use the drive, after he occupied The Gardens, as his principal means of access to the premises.

By a lease dated July 2, 1926, the lessor demised to Paul Griffith (hereinafter called "the defendant"), the dwelling-house known as The Hall, and the whole of the remainder of Wood Green Park. The lease was expressed to comprise "all that mansion house, stalls, and glasshouse and outbuildings . . . . with the gardens, pleasure grounds, park, arable grass meadow, and pasture lands held therewith." The lease was for the term of fourteen years from March 25, 1926, at a yearly rent of 200*l*., and was expressed to be determinable at the end of the seventh year by the defendant, who lived at The Hall and there carried on business as a schoolmaster.

When the plaintiff went into possession of The Gardens, The Hall was not let: but it was shortly afterwards let to one Hough Love, who carried on business as a schoolmaster, and who surrendered his lease before the granting of the lease to the defendant.

In July, 1928, the defendant put up a wire fence which obstructed the plaintiff in his use of the drive. By this action the plaintiff claimed to be entitled to a right of way over the drive, by virtue of the contract of October 10, 1923, and of the operation of s. 62 of the Law of Property Act, 1925, or, alternatively, on the ground that there was not, and had not at any time been, any way to or from The Gardens otherwise than by the drive: and he claimed also an injunction.

Linton Thorp for the plaintiff. The easement passed by the operation of s. 62, sub-s. 2, of the Law of Property Act, 1925. (1) The right of access to the property by the right of way would be "appurtenant to the land," and was conveyed to the plaintiff. It was a right of way conveyed with the land: *Wheeldon* v. *Burrows* (2); *Nicholls* v. *Nicholls* (3); *Hinchliffe* v. *Earl of Kinnoul* (4); *Brown* v. *Alabaster* (5); *Browne* v. *Flower*. (6)

J. Leonard Stone for the defendant. There being neither an express grant nor a way of necessity, the plaintiff can succeed only by proving a way by implication, or under s. 62 of the Law of Property Act, 1925: *In re Peck and London School Board* (7); *Birmingham, Dudley and District Banking*

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(1) Sect. 62, sub-s. 2: "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with, or reputed or known as part and parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

Sub-s. 6: "This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one."

(2) 12 Ch. D. 31.

(3) 81 L. T. 811.

(4) (1838) 5 Bing. N. C. 1.

(5) 37 Ch. D. 490.

(6) [1911] 1 Ch. 219.

(7) [1893] 2 Ch. 315.

Co. v. *Ross* (1); *Clark* v. *Barnes*. (2) The test as to whether that section applies is whether the lessee or purchaser can say that when the contract was entered into the right was enjoyed under such circumstances as to lead to the expectation that it would not be continued.

Linton Thorp in reply referred to *Bayley* v. *Great Western Ry. Co.* (3)

MAUGHAM J. [having stated the facts :] Evidence as to surrounding circumstances is admissible to enable the agreement to be understood : and among the surrounding circumstances of which evidence might so be given would be the intention of both the parties as to the way in which the premises were to be used by the tenant. But I hardly need the evidence which I have that the plaintiff was entering into a lease in order to carry on the trade of a poultry dealer and rabbit farmer, as the agreement states that he is taking the premises for that purpose.

I must however state that I am not satisfied that it was made clear to the plaintiff and his wife that they were not entitled to use the drive, and that the front door was being rendered useless for normal purposes : nor am I satisfied that it was made clear to them that they would not be entitled to get to the orchard or the paddock except by means of a way—not a road—which, upon the evidence, was being constructed at about the time when the lessor entered into the contract. It is true that there was being cut through the spinney at the north part of the paddock a way from Silver Street to the paddock, though it was never a metalled way : but there was no road made across the paddock. It has been established that at many times of the year it would be quite impossible for heavy vehicles to get to the premises along that way. It never had been used as a way before the date of the contract, and it was quite impracticable for many of the purposes of a poultry dealer.

I now have to deal with the law on the subject, which raises points of some difficulty. The date of the contract is a date before the coming into force of the Law of Property Act, 1925, and is a date at which the Conveyancing Act, 1881, was still in force. The plaintiff relies on s. 62, sub-ss. 1 and 2, of the Law of Property Act, 1925, under which certain general words are deemed to be included in a conveyance, and, in particular, the words "ways . . . . reputed to appertain to the land, houses, etc." and "reputed or known as part or parcel of or appurtenant to, the land, houses, etc.": and he asserts that the way along the drive in the front of his house, and the branch drive leading directly to the back of his house, were ways enjoyed with the premises demised by the contract; and he points out that under sub-s. 6, the section applies to conveyances executed after December 31, 1881, and that "conveyance" is defined in s. 205, sub-s. 1 (ii.), to include "a lease . . . . and every other assurance of property or of an interest therein by any instrument, except a will."

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(1) (1888) 38 Ch. D. 295, 307.

(2) [1929] 2 Ch. 368.

(3) (1884) 26 Ch. D. 434, 441.

If the contract of October 10, 1923, is an "assurance of property or of an interest therein," a very curious result follows, for the definition of "conveyance" in the Conveyancing Act, 1881, is limited to documents made by deed, and the contract in the present case is not by deed. (1) The result, therefore, of the argument put forward on behalf of the plaintiff would be that the plaintiff's rights may quite possibly have been enlarged, to the prejudice of the defendant and of the lessor; for this result, having regard to the fact that s. 62 of the Law of Property Act, 1925, is retrospective, will follow if it is to be held that the agreement in the present case is a "conveyance" of land within the meaning of the definition in that Act.

On the whole, I think that it is not a "conveyance," because it is not an "assurance of property or of an interest therein." It is true that, under the decision in *Walsh* v. *Lonsdale* (2) it has been held that, where there is an agreement for a lease under which possession has been given, the tenant holds, for many purposes, as if a lease had actually been granted. "He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say: 'I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that, being a lessee in equity, he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed." That is the well known judgment of Sir George Jessel M.R., with which Cotton and Lindley L.JJ. agreed. But no Court has yet declared that an agreement for a lease for a term of more than three years is an "assurance." It has to be borne in mind that a lease for any term of more than three years must be by deed, and it is well known that, under s. 3 of the Real Property Act, 1845, ". . . . a lease, required by law to be in writing, of any tenements or hereditaments . . . . shall . . . . be void at law unless made by deed." (See now s. 52 of the Law of Property Act, 1925, and the repeal section.)

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(1) Sect. 2 (v.): "'Conveyance,' unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and 'convey,' unless a contrary intention appears, has a meaning corresponding with that of conveyance."

(2) 21 Ch. D. 9, 14.

Walsh v Lonsdale

In my opinion, a contract for a lease exceeding a term of three years does not come within the meaning of the phrase "assurance of property or of an interest therein" as that phrase is used in s. 205, sub-s. 1 (ii.), of the Law of Property Act, 1925: and accordingly I am unable to construe the agreement of October 10, 1923, as if the general words of s. 62 of that Act were included in it. In my opinion, however, the position of the Court in granting specific performance of a contract such as this is the same, in effect, so far as regards rights of way, as if there had been, before the coming into force of the Conveyancing Act, 1881, a conveyance of this property with no mention of rights of way: in other words, the doctrine that a grantor may not derogate from his own grant would apply in the circumstances of this case. The plaintiff being entitled to specific performance, the Court would decide that he must be given all such rights of way as, according to the doctrine of the Court in regard to implied grants, would pass upon a conveyance or a demise. In my view, the principles laid down in such cases as *Wheeldon* v. *Burrows* (1); *Brown* v. *Alabaster* (2); and *Nicholls* v. *Nicholls* (3) are applicable. Without going through all those cases in detail, I may state the principle as follows—namely, that where, as in the present case, two properties belonging to a single owner and about to be granted are separated by a common road, or where a plainly visible road exists over the one for the apparent use of the other, and that road is necessary for the reasonable enjoyment of the property, a right to use the road will pass with the quasi-dominant tenement, unless by the terms of the contract that right is excluded: and in my opinion, if the present position were that the plaintiff was claiming against the lessor specific performance of the agreement of October 10, 1923, he would be entitled to be given a right of way for all reasonable purposes along the drive, including the part that passes the farm on the way to the orchard.

It is true that the easement, or, rather, quasi-easement, is not continuous. But the authorities are sufficient to show that a grantor of property, in circumstances where an obvious, i.e., visible and made road, is necessary for the reasonable enjoyment of the property by the grantee, must be taken prima facie to have intended to grant a right to use it.

Accordingly, and on the authorities which I have mentioned, I hold that the plaintiff is entitled to the rights of way in regard to which the present dispute arises. I have

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(1) 12 Ch. D. 31.
(2) 37 Ch. D. 490.
(3) 81 L. T. 811.

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not thought it necessary to deal with *Clark* v. *Barnes* (1), for the reason that in that case there was a claim for rectification to which the learned judge acceded. In the present case there is no such claim: and for the reasons which I have given, such a claim, had there been one, would have failed.

It should be added that sheep are constantly kept in the park, and I think that the case is one in which, in granting a declaration as to the right of way, I must exact from the plaintiff an undertaking to shut the gate, when he finds it shut, on having used it in the ordinary way.

Solicitors: *Edward Betteley, Smith & Stirling; G. F. Hudson' Matthews & Co., for Charles J. Roberts, Folkestone.*

K. R. A. H.

MAUGHAM J.

1930

Feb. 13.

PRICE *v.* HILDITCH.

[1929. P. 257.]

Easement—Ancient Lights—Nuisance—Right to Light not limited by purposes for which Room Used—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

A right of light by prescription to a room in a residential house is not to be measured by the use to which the room has been put in the past.

The plaintiff owned a freehold house built in and occupied since 1907, and continuously having adequate light to the windows and openings, including kitchen and scullery windows, on its north side, on which it was bounded by the defendant's house. Up to January, 1929, the two houses were separated by narrow passages on either side of a dwarf boundary wall belonging to the defendant, which was also the boundary wall between the back gardens. At the beginning of January, 1929, without intimation to the plaintiff, building operations were begun on the defendant's premises, the boundary wall being raised to form a side wall of the new building. On January 28 the plaintiff's solicitors wrote to the defendant, her builders and her architect, asking that the work should cease at once. Two days later the building was still proceeding, and on February 4 the wall was 15 feet high. On the next day the plaintiff issued a writ, and on February 15 a motion came before the Court. By that date the wall had been raised to its full height of 23 feet, and an undertaking by the defendant not to raise it further was useless. In an action by the plaintiff for a mandatory injunction and damages :—

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(1) [1929] 2 Ch. 368.

Held (i.), that the plaintiff's right of light to the scullery windows was not limited by the use to which the scullery had been put in the past.

(ii.) That, in the circumstances, the case was not one for a mandatory injunction.

Colls v. *Home and Colonial Stores, Ld.* [1904] A. C. 179 and *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, followed.

ACTION.

Walter Henry Price (hereinafter called "the plaintiff"), was owner in fee simple of a house and premises known as 19 Surrey Road, Margate (hereinafter called "the plaintiff's house"), built in 1907 and occupied since July of that year. It had always and continuously enjoyed adequate light to the windows (including the kitchen and scullery windows) on its north side, on which it was bounded by a house and premises known as 17 Surrey Road (hereinafter called "the defendant's house"), owned by Nellie Hilditch (hereinafter called "the defendant"). The plaintiff's house and the defendant's house were semi-detached on their further sides, and between them ran a dwarf wall (hereinafter called "the wall"), 3 feet 9 inches high and 9 inches thick. It was on the defendant's premises and was thus her property, and ran along the entire length of the plaintiff's and defendant's houses from Surrey Road to the end of the back gardens. It was only some 5 feet 6 inches away from the north windows of the plaintiff's house. At the date of this action the plaintiff's house was and had for many years been occupied by a yearly tenant who sub-let it as furnished premises during the summer, and the defendant's house was used as a lodging house. Neither house had a basement. On the ground floor of the plaintiff's house were the kitchen, with two large windows facing north, and the scullery, with two windows somewhat smaller than those of the kitchen. In 1928, the defendant, finding that she needed more accommodation, instructed Mr. Levett, a local architect, to prepare plans for an extension over what was her back garden, and early in January, 1929, without any communication to the plaintiff, the defendant's builder began to raise the wall and in effect to build on it a new wall (hereinafter called "the new wall"), which was to be the side wall of the extension. The plaintiff was apprised of these operations by his solicitor, and he thereupon instructed Mr. George Holliday, an architect and surveyor, to inspect the defendant's house. Mr. Holliday was unable to do so early in January, being stopped on the occasion of his first attempt to reach Margate by snow, and on that of his second by fog. He inspected the site on January 25, and found that builders' materials had been placed and scaffolding erected in the garden of the plaintiff's house, and that the wall was being built upon, and the foreman in charge told him that the new building was to consist of two storeys, and would extend for 42 feet from the back of the main existing wall of the defendant's house. Mr. Holliday found that the new wall was already 9 feet high, and was told that its height when built would be 23 feet. Having verified the information from plans and elevations which the foreman produced, he told the foreman that in his view the new wall would seriously affect the plaintiff's ancient lights, and asked him to stop the building operations at once. He then reported the position to the plaintiff's solicitors, who, on January 28, wrote letters of formal objection, in practically identical terms, to the defendant, her builder, and her architect, asking that the building operations should cease at once, and that any damage done should be made good. About two days later, the plaintiff's architects sent to Margate a representative, who found that despite the letter building operations were continuing. On February 4, Mr. Holliday again inspected the defendant's house, and found that the new wall was 15 feet high. He arranged for photographs of it to be taken on that day, and reported that it was being rushed up and was seriously interfering with the plaintiff's ancient lights. On February 1 the plaintiff's solicitors, having received no answer to their letter of January 28, had written saying that they would issue a writ. On February 2 the defendant's solicitors wrote a letter denying any intended infringement; and on February 4, the date of

Mr. Holliday's last inspection, they wrote an elaborate letter in which, while denying that the plaintiff's lights would be damaged, they stated that they thought that there might be some interference with them, and offered to put in an additional window in a particular place in the plaintiff's house, which they said would remove any possibility of interference with the comfort and enjoyment of the scullery, that being the room chiefly affected. The writ was issued on February 5; on February 7 leave was obtained to serve notice of motion, and on February 15 a motion came before the Court. The defendant gave an undertaking not further to raise the building until the trial of the action or further order, and no order was made on the motion. At that date, however, the wall was already at its full height. The plaintiff now claimed an order on the defendant to pull down so much of the wall and building as interfered with the access of light to his ancient lights and windows, and damages.

Gavin Simonds K.C. and *A. C. Nesbitt* for the plaintiff. The interference with the light to the kitchen and scullery amounts to nuisance, and it is established that these rooms are less suitable for practical purposes than they were before the building was erected.

A. Grant K.C. and *Harold Christie* for the defendant. The kitchen and scullery have now the benefit of reflected light from the defendant's building. Even if it has been proved that the light to the scullery has been interfered with, no damage has been proved, and therefore the plaintiff is not entitled to an injunction: *Robson* v. *Whittingham.* (1) But there is ample light for the purposes of a scullery.

Gavin Simons K.C. in reply. It has been proved that the interference amounts to nuisance, and the plaintiff's remedy therefore lies either in an injunction or in damages. There are present in this case all the elements required to justify the Court in granting a mandatory injunction: *Krehl* v. *Burrell* (2); *Colls* v. *Home and Colonial Stores, Ld.* (3)

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(1) (1866) L. R. 1 Ch. 442. (2) (1878) 7 Ch. D. 551; (1879) 11 Ch. D. 146.
(3) [1904] A. C. 179.

MAUGHAM J. [having stated the facts :] I think that I should say at once that it has not been established before me, though an effort has been made to do so, that the building was rushed up, or that an effort was made to steal a march upon the Court. I think that it is the plaintiff's misfortune that he was away when the building operations began, and that he was not very promptly informed as to what was being done. It is also unfortunate that the architect was unable to make the journey to Margate when he had information as to the facts. On the whole, however, I do not think that this is a case in which the plaintiff can call upon the Court to make a mandatory order on the ground that the behaviour of the defendant has been high handed, or that she has attempted to oust the jurisdiction of the Court.

The questions which arise are : first whether there has been an interference with the plaintiff's legal right, and, secondly, if there has, whether there should be an injunction or damages. It is not in dispute that the only two rooms to be taken into account are the kitchen and the scullery. I have had quite a considerable body of evidence on both sides, two experts for the plaintiff and two for the defendant, one or two lay witnesses for the plaintiff, and, I think, some six or seven witnesses of a lay character on behalf of the defendant. On one side it is alleged that the injury to the plaintiff's two rooms has been very serious, and on the other side it is denied that there has been any injury at all. I confess that for my part I would prefer, in cases of this kind where the injury is not, as it so often is, hypothetical, to deal with the matter very largely as depending upon the actual evidence of ordinary members of the public who have used the rooms before and after the alleged obstruction, and who could give positive evidence as to the injury, if any, which they have suffered. Unfortunately, and I do not think that the plaintiff can be blamed for this, the plaintiff has very little evidence of that character, inasmuch as he is only a reversioner, subject to a tenancy from year to year, and the yearly tenant does not reside there frequently herself. She, I may say, had a house in London until quite recently, and, although she has gone down to these premises occasionally at Christmas, it is very difficult for her or for the plaintiff to call positive evidence to show the extent to which the wall in question has interfered with the use of the kitchen and scullery. On the other hand, a number of witnesses for the defendant say that they can see no difference: they have seen both the kitchen and the scullery, and they say that they are quite well lighted rooms and afford now a quite sufficient light for their comfortable use as a kitchen and a scullery respectively. Some of the evidence on behalf of the defendant has been to me a little surprising. I will, for the moment, pass by the question of the kitchen, and consider the facts as to the scullery alone. The direct light of the scullery has been interfered with. Before the alteration, the two scullery windows enjoyed an exceptional amount of light. The interference with light by the previously existing building opposite the scullery windows amounted only to 24 degrees from the horizontal, so that there was an almost uninterrupted light to these windows. As a result of the new wall the obscuration amounts to 73 degrees, and the amount of direct light, therefore, which can get into the scullery is very small; and there is practically no lateral light which can come to the scullery windows, because of the length to which the wall extends in an easterly direction. A ground plan put in by one of the expert witnesses for the plaintiff shows the amount of floor space to which the light of the sky has access, calculated from the point of view of a table 2 feet 8 inches high, and the fact now is that there is hardly any part of the floor in the scullery from which the sky can be seen, whereas, before the erection of the wall, the sky could be seen from practically the whole of that small room.

I think that it is perfectly plain that there is a very substantial interference with the light of the scullery. I do not think that I am entitled to take into consideration, even were I disposed so to do, the fact that, as things are, some reflected light comes over the top of the plaintiff's building on to the new wall, and is reflected back from the new wall into the scullery. That seems to me a matter depending

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very largely on what happens to the wall—how long it remains bright, whether the defendant chooses to put something on it, for instance, a trellis, or whether there comes to be a growth of creeper on it. It has been well settled, for at least a generation, that reflected light is not to be taken into consideration in a matter of this kind. It was originally suggested, in *Dent* v. *Auction Mart Co.* (1) that glazed tiles would perhaps afford to the plaintiff such light as he had before the alteration, but Wood V.-C. pointed out that there was nothing to compel the defendant or his successors to tile the wall with glazed tiles or to maintain the tiles; and it was in any case a different kind of light from that to which he was entitled by prescription. Accordingly, I do not think that the reflected light, which in my view is, on the evidence before me, very slight in amount as compared with the light of the sky, is a matter which I ought to consider.

I am quite satisfied, therefore, that the scullery light has been very sensibly interfered with, and that the amount of light left to the scullery would not be sufficient for the ordinary purposes of occupation of a room in a residential house, in the sense that the amount of light left, which includes practically no direct light from the sky, would leave the room gloomy and would necessitate a considerable use of artificial light. But the room has been used for a long time past, if not ever since the house was built, simply as a scullery, and evidence which I cannot altogether neglect goes to show that, for the purposes of a scullery, there is still left sufficient light for the ordinary purposes of such a room. In that connection I am in some difficulty, because I am not sure that the decisions since *Colls* v. *Home and Colonial Stores, Ld.* (2) throw much light on the question whether the plaintiff's right is to be in some way limited by the use to which the scullery has been put in the past. The decision of the House of Lords in *Colls' case* shows quite clearly that what has to be considered is not so much the quantum of light taken away as the quantum of light left, and the test adopted by

(1) (1866) L. R. 2 Eq. 238, 251, 252.

(2) [1904] A. C. 179.

all the learned Lords was the test of nuisance. I think that it is fair to say that the word "nuisance" must there be used in a somewhat artificial sense, because nuisance arising from the deprivation of light of a house is not at all like nuisance from noise or smell. "Natural light" is a light which varies of course from sunrise to sunset, from month to month with the height of the sun, from day to day in relation to the weather, and from hour to hour in accordance with the state of the sky or the position of the clouds. The truth is that people who live in towns, and people who live in a gloomy atmosphere, must constantly use artificial light all through the winter, and must always use it when the hours of darkness come. The case of a scullery (or of a kitchen) is further complicated by the circumstance that kitchens and sculleries in towns in this country are constantly situated in basements; and even when they are not in basements, it is the fact, as the excellent witness who happens to have been for many years a French chef told me, that they are often so constructed as to be used throughout the day as well as the night with artificial light. That is the case with a very large number of hotels and big buildings, and it is to some extent the case with every kitchen and scullery that happens to be situate in a basement. That, as I have indicated, seems to me to make it necessary to decide whether I have got to treat the right of the plaintiff as limited by the use to which this particular room has been put. I have come to the conclusion, following some observations of Lord Davey in *Colls* v. *Home and Colonial Stores, Ld.* (1), that his right is not so limited. The learned Lord says: "The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it." And he goes on to say: "According to both principle and authority, I am of opinion that the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question."

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(1) [1904] A. C. 179, 202, 204.

I respectfully adopt those views: and, for myself, I would add that the language of s. 3 of the Prescription Act, 1832, seems to support them, since the section begins with the words: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith, for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible." Nothing is said to indicate that the right is to be measured by the internal arrangements of the building. It seems to me impossible to suppose that the lost grant, the necessity for which as a matter of presumption was superseded by s. 3 of the Prescription Act, 1832, could have been deemed to be a grant of a right to the use of the light to and for the dwelling-house for a particular purpose, though unknown to the owners of the servient tenement. I think it is reasonably clear that the lost grant which juries were directed to presume before the Act must have been a grant of the access to and use of light over the servient tenement, knowingly permitted by the owners of it, to and for certain windows or lights in the dominant tenement, without any question at all as to the use for which the light had been used (as it is phrased, somewhat incorrectly) in the rooms which were lit from those windows. As was pointed out by Lord Lindley, the fact that a house has been unoccupied for twenty years, or that the shutters have been closed for a month at a time, does not prevent the easement being acquired; and this fact tends to support the view which I have adopted. The Statute has created a fresh origin for the easement of light, and enjoyment as of right is not necessary under s. 3; but the nature of the easement has not, in my opinion, been altered.

Accordingly, my judgment is that the plaintiff has suffered a legal wrong in regard to the easement of light which he possessed in respect of the scullery. I am not convinced that the same proposition is true in reference to the windows of the kitchen; and, accordingly, I think that I ought to grant the relief which I shall mention in respect of the scullery only. In coming to that conclusion as regards the kitchen, I am bearing in mind what, according to *Colls' case*, as I understand it, I ought to bear in mind—namely, the very large area of the two windows of the kitchen, and the fact that the direct light to these windows is not interfered with at all, only the lateral light being obstructed. Those are, so to speak, external facts bearing on the question of nuisance on which the owners of the servient tenement may properly rely.

As to proof of damage, I think, since the fact is established that the defendant has wrongfully interfered with the plaintiff's legal right, that I must hold that there has been some damage. In my opinion it is no more necessary in coming to that conclusion that pecuniary damage should be proved at the trial than it is necessary, in asking for an injunction to restrain a trespasser, to prove that a continuing trespass has resulted in pecuniary damage. In such a case at least nominal damages must be due to the plaintiff.

The question then arises whether there should be a mandatory injunction. I have come to the conclusion that I ought to bear in mind the convenience of the parties, the probability that the scullery, as far as one can see, will continue to be used as a scullery, and the fact that it can without great inconvenience be used for that purpose by a moderate increase in the use of electric light. Moreover the result of granting a mandatory injunction would be to impose a large amount of trouble and expense on the defendant; and, as far as I can judge, the pecuniary damage which the plaintiff has suffered can be compensated by a small and easily determined money payment. In other words, I think the conditions mentioned by A. L. Smith L.J. in the well known case of *Shelfer* v. *City of London Electric Lighting Co.* (1) exist in this case. I should

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(1) [1895] 1 Ch. 287.

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not, however, have refused an injunction if I had been of opinion that the defendant had rushed up the building in order to evade the interlocutory injunction of the Court.

On the whole, I think that I must grant an inquiry as to the damage which has been sustained by reason of the interference with the right of light to the windows of the scullery as the same was enjoyed before the erection of the wall by the defendant so as to cause a nuisance.

Solicitors: *Church, Adams, Tatham & Co., for Marshall, Liddle & Downey, Croydon; Patersons, Snow & Co., for K. & W. Daniel, Margate.*

K. R. A. H.

LUXMOORE J.
1930
Jan. 24, 28, 31.

COTTON *v.* HEYL.

[1928. C. 3814.]

Debt—Undertaking by Debtor on staying an Action—Payment of a Sum when received on a future Sale—No Time fixed for Payment—Breach of Undertaking—Contempt of Court—Equitable Assignment by Debtor—Person in fiduciary Capacity — Application to commit or issue Writ of Attachment—Jurisdiction—Rules of Supreme Court, Order XLI., *r.* 5*—Exceptions to Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.

An action for the grant to the plaintiff by the defendant of his proprietary interests in an invention was compromised by an order on certain terms. One of the terms was an undertaking by the defendant to pay the plaintiff a sum of 1000*l.* forthwith (which was duly paid) and a further sum of 4000*l.* out of the first moneys received by the defendant on a future sale of his rights in the invention. No time for the payment of the sum in question was fixed by the undertaking. At the date of the order the plaintiff was aware that the defendant had already disposed of half his rights. The plaintiff having learnt that the defendant had agreed to sell the remaining half interest in these rights to one G. for a sum immediately payable and the balance by deferred payments and that he had used the amount received for his own purposes in breach (as the Court found as a fact) of his undertaking, moved the Court for the committal of the defendant or the issue of a writ of attachment:—

Held, that the undertaking to pay the 4000*l.*—being an undertaking to pay a specific sum out of the moneys to be received in respect of a future sale—constituted a good equitable assignment thereof, and that by dealing with the moneys received in disregard of the undertaking the defendant had committed a breach of his fiduciary duty to the plaintiff. The act of the defendant therefore brought the case within the third exception to the Debtors Act, 1869, s. 4.

But *held* further that the undertaking to pay out of the first moneys received could not be construed as an order to pay forthwith or within a fixed time after receipt within Order XLI., r. 5, and therefore the order for committal or for leave to issue a writ of attachment could not be made. The Court however fixed a time for the payment of the moneys remaining due:

Motion.

In 1928 the plaintiff F. S. Cotton began an action against the defendant G. E. Heyl and a company called the Hycolite Liquid Wall Paper Manufacturing Company, whereby he sought a declaration (inter alia) that by virtue of a certain deed he was entitled to have allotted to him some shares in a safety glass company. He further claimed that by virtue of an agreement contained in certain letters he had been granted the right to acquire from the defendant Heyl the whole of the proprietary interests for the United States of America in an invention belonging to Heyl relating to safety glass.

The whole of the matters in dispute in the action were compromised by an order dated January 21, 1929. The order so far as is material was in the following terms: "The defendant George Edward Heyl by his solicitors undertaking in the terms of paragraphs 1 and 2 of the schedule hereto and both defendants undertaking by their solicitors in the terms of paragraph 5 of the schedule hereto. . . . . It is ordered that all further proceedings in this action be stayed except so far as may be necessary for giving effect to the said terms. . . . ."

The material undertaking was contained in para. 1 of the schedule and was in the following terms: "1. The defendant George Edward Heyl to pay to the plaintiff the sum of 5000*l.* namely as to 1000*l.* forthwith and as to the balance of 4000*l.* out of the first moneys received by or on behalf of the defendant (1.) upon the sale by him of or (2.) upon the grant by him of any licence to work exercise use or vend any right patent or privilege in respect of the said process and in or in respect of any country other than Great Britain and Northern Ireland and the British Dominions including the Irish Free State that is to say on whichever of them the said date and matters Nod. (1.) and (2.) respectively shall first happen."

At the date of this order the plaintiff was aware that the defendant had by an agreement dated September 3, 1928, sold half his interest in the American and foreign rights of the invention to one Morris Greenhill. By an agreement dated March 26, 1929, and made between the defendant and the above mentioned M. Greenhill (therein called "the vendors") of the one part and the Anglo-Mexican Trust Company (therein called "the purchasers") of the other part after reciting that the vendors were jointly entitled to the rights thereinafter mentioned in relation to the process for the manufacture of safety glass and that these rights consisted of (*a*) the applications for patents in the United States of America shortly specified in the first schedule thereto and (*b*) the patents or similar privileges specified in the first part of the second schedule thereto in the foreign countries therein mentioned (therein referred to as "the foreign patents") and the applications for patents or other similar privileges specified in the second part of the second schedule thereto in the foreign countries therein mentioned (therein called "the foreign applications"), it was agreed that the vendors should sell and that the purchasers should purchase first the American applications and the full benefit thereof and secondly the foreign patents and the foreign applications and the full benefit thereof respectively for the sums therein mentioned and that the sales should respectively be completed on July 1, 1929.

By a further agreement dated October 7, 1929 and made between the defendant Heyl of the one part and the above mentioned M. Greenhill of the other part after reciting the agreement of September 3, 1928 under which Heyl's half interest had been sold to Greenhill and the above mentioned agreement of March 26, 1929, it was agreed that Heyl should sell and Greenhill purchase for the sum of "10,000*l*. (ten thousand pounds) to be paid as to 2000*l*. part thereof on the signing of this agreement as to a further 4000*l*. by an acceptance at three months date and as to the remaining 4000*l*. part thereof by an acceptance at six months date all that the share and interest of him the vendor of and in the said process and invention as regards foreign countries together with all additions thereto and improvements therein and also of and in the American patent the American application the foreign patents and the foreign applications and the patents or other similar privileges to be granted in pursuance of the American application and the foreign applications respectively and all patents or other similar privileges which may hereafter be granted in any foreign country for or in respect of the said process and invention or any such addition or improvement as aforesaid and also of and in all extensions and renewals of every such patent or other similar privilege whether now granted or hereafter to be granted." And it was also provided that the sale was to be subject to the agreement of March 26, 1929. On the same day as the agreement was signed M. Greenhill gave the defendant an indemnity in respect of the claims (if any) which might thereafter be made against him in respect of his liability under the order of January 21, 1929.

The plaintiff having ascertained that a company was being formed to exploit the patents and that a sale was contemplated, sought information from the defendant's solicitors and a lengthy correspondence ensued regarding the undertaking given by the defendant. In a letter dated August 22, 1929, the plaintiffs' solicitors wrote drawing the attention of the defendant's solicitors to the order of January 21, 1929, and ending—"It is considered that the undertaking given by the defendant should require him and the company to furnish full information as to what is transpiring in regard to the said balance of 4000*l.*" The answer to that letter was to the effect that no completion of the purchase had taken place as the time had been extended to the end of September and that the defendant had further stated that if anything was due to the plaintiff, it would be paid in due course. On August 29 the plaintiff's solicitors received a further letter from the defendant's solicitors saying: "We are instructed to assure you that as soon as the 4000*l.* becomes payable it will certainly be paid. . . . We do not however consider that it is any part of the undertaking to give information as to any negotiations which may be proceeding from time to time, indeed it would be most harmful in business if one had to give such information. If any arrangements should be contemplated in connection with the sale of the patents for shares instead of cash or for partly shares and partly cash, then of course you will be consulted but otherwise in our view the undertaking is perfectly clear and no claim arises unless and until a sale is effected and moneys received." On November 19, after the agreement of October 7 had been entered into and the moneys received and the sale made, the plaintiff's solicitors again wrote asking for information. The reply stated: "We are in receipt of your letter of yesterday . . . ., we have already disagreed with you as to the position of matters and as to the information to which your client is entitled. The order of the court speaks for itself and we do not see how either the company or Mr. Heyl can be called upon to give information but only to fulfil the obligation if and when it arises. At the same time we will enquire as to whether any information can be given voluntarily." On December 5 the plaintiff's solicitors wrote to the defendant's new solicitors asking for definite information as to the completion of the purchase and whether any sale had been completed or not and on December 7 they received a reply: "With reference to your recent letters we have felt unable to reply to them hitherto because Mr. Heyl entered into certain arrangements with Mr. Morris Greenhill and one of the terms of these arrangements was that Mr. Greenhill should indemnify Mr. Heyl against all claims by Mr. Cotton under the order of the court. We therefore felt that it was only right that Mr. Greenhill should be consulted before our reply to you." On December 9 the plaintiff's solicitors wrote pointing out that they did not understand why information had been refused and why the particulars of the contract that had been entered into for the sale of the foreign patents should not be given and they asked for a copy of the agreement. On December 10 the defendant's solicitors replied denying that they had refused to supply the information.

On December 17 a motion came before Farwell J. for an order for the committal or alternatively for leave to issue a writ of attachment against Heyl for not paying to the plaintiff the balance of the 4000*l.* received by or on behalf of the defendant upon the sale to M. Greenhill for 10,000*l.* of the rights, patents and privileges in respect of the process or invention relating to safety glass. The motion also referred to the payment of the money in cash and bills of exchange and asked for certain alternative relief. At the hearing Heyl gave an undertaking forthwith to direct his bank—with whom the bills of exchange mentioned in the plaintiff's affidavit were lodged, to pay the proceeds of the January bill—there were in fact two bills—into a joint account in certain joint names subject and without prejudice to any charge or lien of the bank on the bills or the proceeds thereof. On that the motion was ordered to stand over. Nothing however having been done and the money owing by the defendant being still due, a motion was now made to the court to commit or alternatively to issue a writ of attachment against him for breach of the undertaking contained in the order of January 21, 1929, or for alternative relief.

Sir Thomas Hughes K.C. and *A. de W. Mulligan* for the plaintiff. The sale by the defendant Heyl was a breach of the undertaking—and the plaintiff is therefore entitled to succeed on the motion.

J. M. Gover K.C. and *Alexander Cairns* for the defendant. The remedy sought by the plaintiff is one affecting the liberty of the subject and everything therefore must be perfectly regular: *Taylor* v. *Roe.* (1) It is submitted first that there has been no breach of the undertaking. Further the Court cannot commit or attach a defendant for breach of an undertaking to pay money to another. This undertaking has no greater effect than an order on a person: *Buckley* v. *Crawford.* (2) As to the enforcement of a judgment, see Annual Practice, 1930, p. 740, Order XLII., r. 7. For the plaintiff to succeed, he must bring the case within one or other of the exceptions to the Debtors Act, 1869 and this

(1) (1893) 68 L. T. 213, 214.

(2) [1893] 1 Q. B. 105, 107.

he has not done. (1) Also no time has been fixed for any payment of the sums covered by the undertaking: *Carter* v. *Roberts* (2); *In re Oddy* (3); compare *In re Launder* (4), and see Order XLI., r. 5. The proper remedy is the appointment of a receiver. For these reasons the order asked for by the plaintiff cannot be made and the remedy sought by the motion so far as it asks for committal or writ of attachment is irregular.

[LUXMOORE J. There is a question whether there has been an equitable assignment or not: *Tailby* v. *Official Receiver*. (5)]

Yes. *Carter* v. *Roberts* (2) is strongly relied on.

Sir Thomas Hughes K.C. in reply. Whatever may be urged on behalf of the defendant, it is submitted that a breach of the undertaking has been committed and a grave contempt of court has resulted: see remarks of Byrne J. in *Carter* v. *Roberts*. (6) Though the defendant may say that the plaintiff has to bring the case within one or other of the exceptions to the Debtors Act, 1869 (1), it is not necessary to bring an undertaking of this nature within any of them. It is not merely default in the payment of a sum of money, it is an order to pay a special sum out of a special fund and s 4 need not necessarily be referred to or relied on: *Bates* v. *Bates*. (1) There has been an equitable assignment of future property and this property is bound: *Legard* v. *Hodges* (2); *Tailby* v. *Official Receiver*. (3)

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(1) Debtors Act, 1869, s. 4. "With the exceptions herein-after mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment:

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:

3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:

4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorised to make an order:

6. Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made."

(2) [1903] 2 Ch. 312.

(3) [1906] 1 Ch. 93.

(4) (1908) 98 L. T. 554.

(5) (1888) 13 App. Cas. 523, 543, 546.

(6) [1903] 2 Ch. 312, 321.

The case may perhaps on other grounds fall within the third exception to s. 4 of the Debtors Act, 1869 (4), *Hutchinson* v. *Hartmont*. (5) The defendant is more or less in the position of a trustee: *Preston* v. *Etherington*. (6) The fact that the defendant has wrongfully parted with the money due to the plaintiff is immaterial: *In re Smith* (7), it does not excuse him from his liability to pay, he is in a "fiduciary capacity": *Marris* v. *Ingram*. (8)

LUXMOORE J. This is a motion to commit or alternatively to issue a writ of attachment against the defendant George Edward Heyl for breach of an undertaking given by him to the Court and for certain relief in the further alternative to which I will refer later. [His Lordship read the order and undertaking of January 21, 1929.] By the undertaking the defendant undertook in effect to pay 1000*l*. at once which was in fact paid and 4000*l*. out of the first moneys he should receive in the particular event which is applicable at the present time upon the sale by him of the foreign rights in the patent. It was agreed that at the date of the order Heyl had by an agreement dated September 3, 1928, already sold half his interest in the American and foreign rights of his invention to one Greenhill. This the plaintiff knew, so that the undertaking could only apply to what Heyl might subsequently receive in respect of his interests from any dealings with the foreign rights of his invention whether by the sale or grant of licences.

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(1) (1888) 14 P. D. 17, 19.
(2) (1792) 1 Ves. jun. 477, 478.
(3) (1888) 13 App. Cas. 523, 543, 546.
(4) See note (1) ante, p. 516.
(5) (1877) W. N. 29.
(6) (1887) 37 Ch. D. 104, 110.
(7) [1893] 2 Ch. 1, 14.
(8) (1879) 13 Ch. D. 338.

After the order of January 21, 1929, was made, Heyl and Greenhill entered into an agreement to sell the American and foreign rights to a company called the Anglo-Mexican Trust, Ld. That agreement is dated March 26, 1929. It is clear that the moneys (if any) which were received by Heyl under this agreement would have been bound by the undertaking contained in the order. Nothing in fact was received under the agreement and on October 7, 1929, Heyl entered into another agreement with Greenhill for the sale of his remaining half interest in the American and foreign rights subject to and with the benefit of the agreement of March 26, 1929.

It is plain that this is an agreement for the sale by Heyl of his interests in the foreign rights in respect of the invention subject of course to the agreement of March 26, 1929, and as the result of this agreement Heyl was to receive an immediate payment of 2000*l.* and certain deferred payments. But even if the agreement of March, 26, 1929 had been carried into effect Heyl could never himself have received any part of the moneys payable under that agreement. All he was entitled to was the payment at once of the 2000*l.* and the payment by the bills of the 8000*l.* This was the only money that Heyl could and would receive in respect of his rights, and in spite of Mr. Gover's protest that it would not be right to treat the agreement of October 7, 1929, as more than a sale by the defendant of his rights under the agreement of March 26 1929, I am satisfied that on the plain meaning of the words used in the agreement of October 7, 1929, this was a final sale by Heyl of his interest in the patents carrying with it the benefit of the agreement of March 26, 1929, and that if that agreement was cancelled the sale of Heyl's remaining half interest in the invention still remained operative and effective. It is true that at the time this agreement was entered into Greenhill gave Heyl an indemnity in respect of his liability under the order of January 21, 1929, and I think the fact that this indemnity was given shows that Heyl appreciated that the liability under the undertaking was operative and in existence. There is no doubt, indeed Mr. Gover has admitted it, that on or shortly after the execution of the agreement of October 7 1929, Heyl received 2000*l.* in cash and I think four bills each for 2000*l.* in respect of the remaining 8000*l.*, the first two bills being payable on January 7, 1930, and the remaining two on April 7, 1930. The 2000*l.* was received by Heyl at once but notwithstanding his undertaking he has apparently used that sum for his own purposes. I have no doubt that this was a breach of his undertaking contained in the order of January 21, 1929.

I have also no doubt that Heyl retained this money in breach of his undertaking and with knowledge of it, because for some time before the agreement of October 7, 1929, was entered into the plaintiff by his solicitors was pressing Heyl through his solicitors for information with regard to the undertaking. [His Lordship referred to the correspondence, the effect of which is set out above.] At the time that the undertaking was given in December during the proceedings before Farwell J., Heyl's banking account was in debit to a sum considerably in excess of the amount of the two bills and if "subject to the lien of the bank" meant "subject to the payment to the bank of that overdraft" the undertaking was to the knowledge of Heyl when he gave it worthless, wholly illusory and an undertaking which ought not to have been offered. Of course the plaintiff had no idea of the facts and was justified in assuming that the undertaking was at least to some extent operative. But the result is that as regards the 10,000*l.* out of the first money that Heyl was to receive for the sale of his interest in the foreign rights he has used for his own purposes the first 4000*l.* received. The next 2000*l.* apparently stands in the books of the bank to some separate account which is subject to the bank's lien and whether that is available or not to answer the undertaking I am not in a position to say at the present moment. I am satisfied of this, that having received 8000*l.* out of the 10,000*l.* he has by failing to pay the 4000*l.* to the plaintiff broken the undertaking which he gave to the court on January 21, 1929, and I have no doubt that that was done

LUXMOORE J.

1930

COTTON v. HEYL.

deliberately and with knowledge of the order and that there has been in fact a grave contempt of court.

Mr. Gover has, besides arguing that there has been no breach, submitted two technical grounds which he claims to be fatal to the making of an order for committal or giving leave to issue a writ of attachment against the defendant. The first technical objection is that the undertaking is equivalent to an order to pay money and that an undertaking or order of this nature cannot be enforced by committal or the issue of a writ of attachment unless the case falls within one or other of the exceptions to the Debtors Act, 1869. I agree that this view is correct. Mr. Gover has argued that this particular case does not fall within any of the exceptions to the Debtors Act, 1869, but I do not agree with him so far as that argument is concerned. In my view the undertaking to pay the sum of 4000*l.* out of the first moneys to be received from the sale of the particular rights which have been sold constituted a good equitable assignment of the 4000*l.* and one which was binding in equity on the defendant Heyl, and by dealing with the 4000*l.* which he received from the sale of his interest in the foreign rights of his invention in disregard of that equitable assignment he has committed a breach of his fiduciary duty to the plaintiff. If any authority be needed for this conclusion I would refer to the judgment of Lord Macnaghten in *Tailby* v. *Official Receiver* (1), where he says this: "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." The other passage that I wish to refer to is where after having dealt with *Holroyd* v. *Marshall* (2) he says this: "Long before

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(1) (1888) 13 App. Cas. 523, 543, 546.

(2) (1861–62) 10 H. L. C. 191.

Holroyd v. *Marshall* (1) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust,'" and he then refers to the well known case of *Legard* v. *Hodges*. (2)

In my opinion the undertaking in this case, being an undertaking to pay a specified sum out of the moneys to be received in respect of a future sale, is clearly an equitable assignment of that sum and the fact that in the order of January 21, 1929, the defendant was ordered to pay or what was equivalent to an order, undertook to pay that sum brings this case within the third exception to s. 4 of the Debtors Act, 1869. The third exception is: "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control."

My attention has been called to a decision of Byrne J. in *Carter* v. *Roberts*. (3) In that case the defendant gave an undertaking as also did the plaintiff "to pay all sums of money which shall be received by them in respect of the matters in dispute in this action to the credit of the partnership account of the plaintiff and defendant with [certain banks]." There was some doubt whether there had in fact been any breach to which the undertaking applied. The learned judge decided that that case was not within any exception to the Debtors Act, 1869. The undertaking in fact was merely to pay into a joint account to await the decision of the court, and with all possible respect to the learned judge it is a little difficult to see how this was an order for payment of money covered by the Debtors Act at all. Indeed the decision hardly seems to be in accord with what was said by the Court of Appeal in the case of *Bates* v. *Bates*. (1) In that case an order had been made that the husband should pay into court a sum of money as security for costs and it is quite true that he was given the alternative of giving a bond for that money. It was argued there that the case came within the Debtors Act, 1869 and the Court held that it did not do so. Lindley L.J. in giving judgment said this: "But what do the words 'payment of money' in this section [s. 4 of the Debtors Act, 1869] mean? In my opinion, they do not mean depositing a sum of money in court, to abide an order to be subsequently made. If the appellant had been ordered to pay the money to the receiver of the Court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here; he is to deposit the money in court, or to give security for it." I am satisfied in the present case that there has been a breach of an undertaking which is within the Debtors Act, 1869, s. 4. So far therefore as the first technical objection is concerned, I am of opinion that it fails.

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(1) (1861–62) 10 H. L. C. 191. (2) 1 Ves. jun. 477.
(3) [1903] 2 Ch. 312.

The second technical objection is this; by the order of January 21 the undertaking is to pay the 4000*l*. out of the first moneys received by or on behalf of the defendant upon the sale by him of the patents. Obviously this is an order to do an act and by Order XLI., r. 5 it is provided that, "every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done . . . .," and then it provides of course for the service of the order with the proper memorandum endorsed on it. Mr. Gover has argued that the undertaking to pay out of the first moneys received is quite indefinite and cannot be construed as an order to pay forthwith or within a fixed time after receipt and therefore unless and until a definite time for payment is fixed there can be no default. It appears to me that this argument is well founded and therefore I feel that on this ground I am unable to make the order for the issue of a writ of attachment asked for by the plaintiff.

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(1) 14 P. D. 17, 20.

The plaintiff has however asked by his notice of motion for certain additional or alternative relief. Among other relief he asks for injunctions to restrain the parting or dealing with the bills or the moneys which have been received in respect of them without making a payment to the plaintiff. The defendant has in the witness box stated that the whole of the bills have been dealt with and that it is no longer in his power to make the payments out of the particular moneys, though I think he stated that if he had to pay he would be able to do so. So far as that is concerned I do not think that any injunction which I can order would have any useful purpose. But so far as this motion is concerned there is an alternative claim for a four-day order. It is true that the alternative claim asks that the defendant may be ordered to pay into court but I do not think that the plaintiff is entitled to that order. I think however that he is entitled to a four-day order against the defendant for the payment of this 4000*l.* and I accordingly on this motion make a four-day order against the defendant that he pay to the plaintiff the sum of 4000*l.*, within four days after service upon him of the order which I now make and I order the defendant to pay the costs of this motion.

Solicitors: *Castle & Co.; Cruesemann & Rouse.*

A. R. T.

BENNETT J.

1930 Feb. 12.

In re ROADLEY.

IVESON *v.* WAKEFIELD.

[1929. R. 863.]

Will—Charitable gift—Trust fund—Income for maintenance of patients in certain hospitals—43 *Eliz. c.* 4.

A testator, by his will, gave a sum of 3000*l.* to his trustees upon trust for investment and directed that the yearly income thereof should be applied "in payment of the expenses and maintenance of patients from the parishes of" S. and S. to and at two named hospitals or either of them:—

Held, that the gift was a trust for the relief of impotent and poor persons within the purposes set out in the preamble to the Statute of Elizabeth and was a valid charitable bequest.

Adjourned Summons.

By his will dated June 29, 1923, John Gravenor Roadley, of Scotter, in the county of Lincoln, after bequeathing certain legacies directed as follows: "I give to my trustees the sum of 1000*l.* free of duty upon trust to invest the same and apply the yearly income thereof for the benefit of the District Nursing Fund Committee for the parishes of Scotton and Scotter providing the district nurse resides in the parish of Scotton and in the event of there ceasing to be such District Nursing Committee or the nurse residing as hereinbefore mentioned then I direct my trustees to hold the said investments upon the like trusts as are hereinafter declared concerning the sum of 2000*l.* and I give to my trustees the sum of 2000*l.* to be called the Roadley Trust free of duty upon trust to invest the same and apply the yearly income thereof in payment of the expenses and maintenance of patients from the parishes of Scotton and Scotter aforesaid to and at the John Coupland Hospital Gainsborough or the Lincoln County Hospital or either of them."

By a codicil dated July 22, 1924, the testator, after reciting that he had by his will bequeathed certain moneys to his trustees to invest the same and apply the income thereof in payment of the expenses and maintenance of patients from the two parishes above mentioned to and at the two hospitals above mentioned or either of them, directed as follows: "Now I hereby declare that if in any year there shall be any surplus of income of the said trust fund after paying such expenses my trustees shall pay such surplus each year to the John Coupland Hospital General Fund as a donation or subscription thereto."

The testator died on March 30, 1927, and at the date of his death there was no district nurse residing in the parish of Scotton. The sum of 1000*l.* became, therefore, subject to the same trusts as those declared concerning the sum of 2000*l.*

The surviving executor and trustee of the will took out this summons for the determination of the question (inter alia) whether the gift of 2000*l.* contained in the will (and also the gift of 1000*l.* bequeathed for the benefit of the District Nursing Fund Committee mentioned in the will, which bequest failed) and referred to in the codicil was a good charitable bequest.

Guest Mathews for the plaintiff.

Vaisey K.C. and *G. D. Johnston* for the treasurers of the two hospitals. A gift to assist persons to obtain the benefit of a charity presupposes that the objects of the gift are proper objects of a charity. The gift is only concerned with persons who are potential inmates of these charitable hospitals. If the gift in the will were bad, it could not be argued that the gift of the surplus in the codicil carried the whole fund to the John Coupland Hospital: see *In re Porter*. (1) The two hospitals are charitable institutions which are intended for poor people. The primary trust, being for patients, presupposes persons already accepted by the hospitals, and the gift is a good charitable bequest.

Stafford Crossman for the Attorney-General. This is a good charitable gift, because it is a gift for the benefit of the inhabitants of the two parishes and because the objects are analogous to those mentioned in the preamble to the Statute

(1) [1925] Ch. 746.

of Elizabeth, the gift being for the benefit of impotent and poor persons. *In re Gwyon* (1) leaves it open to the Court to say that a gift for the benefit of the inhabitants of a district is a good charitable gift. In *In re Christchurch Inclosure Act* (2) it was held that a gift for the benefit of the occupiers of cottages in a particular district was a valid charitable gift. The present gift should be restricted to impotent and poor persons, and not merely to poor persons. The hospitals are charitable institutions for the relief of suffering and are not restricted to poor persons. The Court is justified in being benevolent: see the observations of Lord Herschell in his speech in *Commissioners of Income Tax* v. *Pemsel.* (3)

[He also referred to *In re Dudgeon.* (4)]

Morton K.C. and *Gilbert Hurst; Daynes, Evershed,* and *Harold Christie,* for other parties interested, did not contest the point.

BENNETT J. The question to be determined is whether the gift of 2000*l.* and the gift of 1000*l.* under the will and codicil of the testator are or are not good charitable bequests. The terms of the bequest of the sum of 1000*l.* in the will are as follows: [His Lordship read them.] There was no district nurse residing in the parish of Scotton when the testator died; therefore the sum of 1000*l.* was to be held on the same trusts as those declared concerning the 2000*l.* Those trusts were in these words: [His Lordship read the trusts]. By a codicil the testator provides as follows: [His Lordship read the codicil].

Now the trust is a trust of income in perpetuity and, unless it is a charitable trust, it is void. In my judgment it is a good charitable trust. The terms of the trust are to apply the yearly income in the payment of " the expenses and maintenance of patients to and at" one or other of the two hospitals. There are two grounds upon which the conclusion that this is a good charitable trust may be based. The first ground is that it is a trust for the relief of a form of helplessness, which excites the compassion and sympathy of mankind and so appeals to their benevolence, and is analogous to the purposes set out in the preamble to the Statute of Elizabeth. Amongst the purposes recited in the Statute of Elizabeth is the relief of aged, impotent and poor people. A trust to provide out of the income for the expenses and maintenance of patients in a hospital is a trust for the relief of impotent people and therefore, in my judgment, a good charitable trust.

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(1) [1930] 1 Ch. 255.
(2) (1888) 38 Ch. D. 520.
(3) [1891] A. C. 531, 571.
(4) (1896) 74 L. T. 613.

The second ground is that the gift ought to be construed as being a gift for the relief of poor patients of Scotton and Scotter at one or other of the two hospitals. The conclusion that it was the intention of the testator that the gift should be for the benefit of poor persons is to be inferred, first, from the amount of money which would be available as income from an investment of 3000*l.*—such an inference was drawn in like circumstances by Russell J. in *In re Lucas* (1) ; and, secondly, from the fact that the particular institutions in which the patients are to be maintained are institutions governed by rules which show that they are intended for the maintenance of patients who are, prima facie, to be not destitute but poor persons.

Solicitors : *E. H. Davies & Co., for Iveson & Son, Gainsborough; The Treasury Solicitor; Alfred Powell, for R. A. C. Symes, Scunthorpe; Oldman, Cornwall & Wood Roberts, for Ollard & Ollard, March; Blundell, Baker & Co., for Carter, Bentley & Gundill, Pontefract; Stafford Clark & Armitage, for Armitage, Speight & Ashworth, Leeds.*

J. L. D.

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(1) [1922] 2 Ch. 52.

C. A.

1929

CLAUSON J.

Nov. 27, 28.

C. A.

1930

Jan. 22, 23; *Feb.* 19.

HUNTOON COMPANY *v.* KOLYNOS (INCORPORATED).

[1928. H. 3845.]

Patent—Licence—Licence to "Make, Use, Exercise and Vend" Invention—Condition requiring Licensee to acquire from Licensor Articles not protected by Patent—Void Condition—Breach of a Condition by Licensor—Condition not going to Root of Contract—Right to sue on Breaches of other Conditions by Licensee—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 38.

By a deed of licence dated August 8, 1923, an inventor granted to the defendants the exclusive right to "make, use, exercise and vend" the invention (protected by letters patent) of a collapsible tube for holding tooth paste or the like, having a closure cap attached to the tube by an elongated wire loop or "spring form" hinged on the tube. The inventor reserved to himself the sole right of manufacturing the spring forms, and the licence was subject to the following conditions (inter alia)—namely, (1.) (clause 1) that the defendants should buy from the inventor all the spring forms which might be required for the manufacture of the tubes under the licence; (2.) (clause 9) that the tubes should not be sold by the defendants without having the words "Cap Patented No. 137,720" stamped on them; (3.) (clause 7) that the inventor should at all times during the continuance of the patent at his own cost, at the request of the defendants, commence and prosecute all legal proceedings in respect of infringement or suspected infringement of the patent or permit the defendants to do so in his name and at his cost.

In an action by the plaintiffs, who were the assignees of the patent subject to the licence, they charged the defendants with having purchased from a company collapsible tubes made in accordance with the plaintiffs' invention and fitted with spring forms purchased from the company in breach of clause 1 and also with selling the tube unstamped in breach of clause 9:—

Held, (1.) that the deed of licence was a contract made "in relation to . . . . the licence to use or work any article . . . . protected by a patent" within the meaning of s. 38, sub-s. 1, of the Patents and Designs Act, 1907, and therefore that the condition requiring the defendants to purchase from the inventor the spring forms which were articles not protected by the patent, was rendered by s. 38, sub-s. 1 (*b*), null and void, as being in restraint of trade and contrary to public policy.

The reasoning in *Sarason* v. *Frénay* [1914] 2 Ch. 474 applied.

(2.) That the plaintiffs' failure to comply with clause 7 on being required before action by the defendants to take proceedings for infringement against the company did not deprive the plaintiffs of their right to enforce clause 9, as the conditions in the two clauses were not interdependent, and the condition in clause 7 did not go to the root of the contract.

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Decision of Clauson J. affirmed on the first point and reversed on the second point, and the action remitted to the Court below on the question whether the defendants had committed a breach of clause 9 of the licence.

The principles applicable in determining whether stipulations are interdependent discussed and applied.

WITNESS ACTION.

The plaintiffs were the registered legal owners of letters patent No. 137,720 for an invention of a collapsible tube for holding tooth paste or the like, having a closure cap attached to the tube by a wire loop or "spring form" hinged on the tube. The letters patent had been granted to William C. Huntoon, the inventor, on April 30, 1919; and on July 4, 1925, they were assigned by the inventor to the plaintiffs subject to and with the benefit of a licence which had previously been granted by the inventor to the defendants. By the licence, which was by deed dated August 8, 1923, the inventor granted to the defendants the exclusive right to "make, use, exercise and vend" the invention, but reserved to himself the sole right of manufacturing the spring forms during the continuance of the patent. The licence was expressed to be subject to (inter alia) the following conditions —namely: (1.) (clause 1) that the inventor should sell and the defendants should buy from him all the spring forms which might be required for the manufacture of the tubes under the licence; (2.) (clause 4) that the defendants might grant a sub-licence to John Dale Manufacturing Company (hereafter called Dale & Co.) for the manufacture of such tubes as the defendants might require for their business; (3.) (clause 9) that no tubes should be sold by the defendants without the words "Cap Patented No. 137,720" being stamped thereon, and (4.) (clause 7) that the inventor should at all times during the continuance of the patent, at his own cost, at the request of the defendants commence and prosecute all legal proceedings in respect of any infringement or suspected infringement of the patent or permit the defendants to do so in the name and at the cost of the inventor.

By a letter written on July 13, 1928, the plaintiffs, through their solicitors, accused the defendants of obtaining supplies of collapsible tubes with captive caps from Dale & Co. made in accordance with the plaintiffs' patent specifications, and of purchasing spring forms in breach of clause 1 of the licence, and also of omitting to stamp the tubes in breach of clause 9, and called upon the defendants to discontinue marketing the tubes and caps and claimed compensation for the loss incurred by the plaintiffs.

In reply, the defendants, through their solicitors, wrote denying that the tubes they obtained from Dale & Co. were made in accordance with the plaintiffs' patent and calling upon the plaintiffs to take proceedings, in pursuance of their undertaking contained in clause 7 of the licence, for the infringement of their letters patent of which they (the defendants) understood the plaintiffs complained. On December 12, 1928, the defendants through their solicitors wrote to the plaintiffs' solicitors the following letter: "Referring to our previous correspondence herein we are surprised that your client has not commenced proceedings in respect of the alleged infringement of his patent. Your letter to us accuses our client of having committed a breach of the licence agreement dated August 8, 1923. It is abundantly clear that the breach, if any, (which we need hardly repeat is denied) of which you complain is the purchase by our clients from John Dale & Co. of articles which your client says are an infringement of his patent. In our previous letters to you we pointed out that in the event of any 'infringement or suspected infringement of the said letters patent' your client was bound 'to commence and prosecute all legal or other proceedings' and we request you to take the necessary steps. Apparently, notwithstanding our requests, your client has not taken any proceedings. In view of his inaction for a period which now extends over several months, we are advised that we are entitled to require and we do require your client to do one of two things, viz.: (*a*) If your client persists to-day in his allegations concerning the infringement or even a suspected infringement, then, that in accordance with clause 7, he should take the necessary proceedings forthwith or permit our clients to do so in his name and at his cost; (*b*) that, if he is unwilling either to take or to authorise such proceedings, that he definitely withdraw his allegation concerning infringement or suspected infringement. Kindly let us hear from you in the matter at your early convenience."

On December 14, 1928, the plaintiffs replied declining to take the suggested proceedings, and instead announced their intention to issue the writ in this action.

The plaintiffs accordingly brought this action, and by their statement of claim charged the defendants with having, in breach of the first clause in the licence, purchased from Dale & Co. (whom they described as sub-licensees under the defendants, but who in fact held no sub-licence under them) slightly modified forms of tube and cap adapted for use with a modified spring form made in accordance with all the claims of the complete specification of the letters patent; and they further charged the defendants with having, in breach of clause 9, sold a modified form of tube and cap, without stamping the same with the words "Cap Patented No. 137,720." The plaintiffs claimed a declaration that the tubes so obtained from Dale & Co. were made in accordance with their letters patent and an injunction to restrain the defendants from selling tubes made in accordance with the plaintiffs' letters patent and not stamped as required by clause 9 of the licence. The defendants denied that the tubes obtained by them from Dale & Co. were made in accordance with the plaintiffs' patent or that the purchase of the spring forms from that firm was a breach of the licence. They further pleaded that if they did so purchase tubes as the plaintiffs alleged, such purchases were not in breach of the licence on the ground that clause 1 was rendered null and void by s. 38 of the Patents and Designs Act, 1907. (1)

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(1) Sect. 38, sub-s. 1: "It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent to insert a condition the effect of which will be"—

"(*b*) To require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent";

"and any such condition shall be null and void, as being in restraint in trade and contrary to public policy."

and, further, that the plaintiffs who alleged infringement of their patent had, through their refusal, at the defendants' request, to take proceedings against Dale & Co. in pursuance of their obligations under clause 7 of the licence, wrongfully repudiated the contract.

Sir Arthur Colefax K.C. and *Eric Bousfield* for the plaintiffs. The condition in the licence requiring the defendants to acquire the spring forms from the plaintiffs is not null and void, because, upon the proper construction of s. 38, sub-s. 1, of the Patents and Designs Act, 1907 (1), this licence is not a contract within the meaning of that sub-section: it is not a contract in relation to a licence "to use or work any article," but the licence is to "make, use, exercise and vend" the invention. The licence is to do something in addition to "using or working" a patented article, and therefore does not constitute a contract within the meaning of the section. This case is distinguishable from *Sarason* v. *Frênay* (2), as that was an action for infringement of a patent, which this is not; and therefore that case is not in point. As regards the alleged breach of the contract by the licensors; the defendants did not call upon them to take proceedings against Dale & Co. for infringement in pursuance of clause 7 of the licence. Up to the date of the writ in the action the defendants were only negotiating with the plaintiffs in reference to the question of infringement. The defendants by having themselves acquired the patented articles from Dale & Co. precluded themselves from complaining of an infringement of the patent by Dale & Co. The plaintiffs have not accused Dale & Co. of infringing their patent. The substance of their complaint was that the defendants had acquired from Dale & Co. a modified form of cap. They have not alleged that Dale & Co. assembled the parts and infringed their patent. The agreement to take legal proceedings for infringement was entered into for the benefit of the licensees who have not complained of infringement.

Sir Duncan Kerly K.C., *Graham Mould* and *Trevor Watson* for the defendants. The licence granted by the plaintiffs is a contract in relation to a licence "to use or work" an article protected by a patent within the meaning of s. 38, sub-s. 1, in spite of the fact that this licence is larger than the licence described in that sub-section, in that it extends to "making" the article. The failure of the plaintiffs to take legal proceedings against Dale & Co. for the infringement of their patent when called upon to do so by the defendants in pursuance of clause 7 of the licence is a complete answer to the plaintiffs' claims. The plaintiffs agreed to take proceedings in respect of any infringement or suspected infringement of their patent. They promised by their contract that the defendants should enjoy a monopoly and undertook to protect it: their failure to protect it goes to the root of the contract which entitles the defendants to regard it as a repudiation by the plaintiffs of the whole contract: *Millar's Karri & Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1)

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(1) See note (1) ante, p. 531.

(2) [1914] 2 Ch. 474.

Sir Arthur Colefax K.C. replied.

CLAUSON J. This is an action by the patentees—that they are, in fact, assignees of the patent not being material for the present purpose—against the defendants who are licensees. The letters patent relate to an invention for a particular attachment and cap for a collapsible tube, the virtue of which appears to be that the chance is minimized of dropping or mislaying the cap while using the tube.

The defendants were granted a licence by the original patentee on August 8, 1923. The licence, so far as material, is in these terms. [His Lordship then stated the material parts of the licence above set out—namely, the grant to the defendants and the reservation to the inventor of the sole right to manufacture the elongated wire loop or "spring form," and clauses 1, 4, 5, 7 and 9, and continued:] The action is brought to recover damages on account of the failure of the defendants to take the agreed minimum number of "spring forms" under clause 1 which I have read. I need not concern myself with that matter, as the parties have come to an agreement in settlement of that claim which they propose to register in any order that may be made in this action.

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(1) (1908) 100 L. T. 128.

The next relief claimed by the plaintiffs is a declaration that the modified form of tube referred to in their statement of claim and which had been obtained by and used or sold by the defendants, is made in accordance with the claims in the plaintiffs' patent. The third claim in the statement of claim is for an injunction restraining the defendants from purchasing or obtaining from persons other than the plaintiffs spring forms for use with tubes made under the terms of the licence. The fourth claim is for an injunction restraining the defendants from selling or offering for sale any tubes made in accordance with the plaintiffs' patent, unless they have the patent number stamped upon them in accordance with the ninth condition in the licence which I have read.

The first question which arises upon the matter is this. The Patent and Designs Acts, 1907 and 1919, contain this section. [His Lordship then read s. 38, sub-s. 1 and clause (*b*) of that sub-section and continued :] It is suggested that the section hits this particular licence, and in particular the first condition which requires the licensee to buy from the inventor the spring forms and pay 75 cents per gross for them. The first question I have to consider is : is this document of August 8, 1923, a "contract . . . . made in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent" ? The contract relates to a licence which is granted in the first part of the indenture of August 8, 1923 ; and it is—omitting the immaterial words—a licence to use the invention, the invention being the particular form of cap and attachment for collapsible tubes. I confess for myself I am unable to appreciate how it is possible to say with truth that this is not a contract in relation to a licence to use an article protected by a patent. It is said it is not that, because the licence mentioned in s. 38, sub-s. 1, does not include manufacturing the article. I confess I cannot follow it. It may be the licence in question is wider than a licence to use ; but if I find that this contract is in relation to a licence to use, then the Act is satisfied and applies to it. I am afraid I entirely fail to appreciate how I can possibly reach any other conclusion than that this is such a contract as is mentioned in the section. If it be such a contract, then it is not lawful to insert in it a condition requiring the licensee to acquire from the licensor any article not protected by the patent. It is admitted, and there is no controversy about it at all, that the particular bit of bent wire—because that is really what it is—which is named in this contract a "spring form," is an article which of itself is not protected by the patent. It is true it is an article which may have to be used for the purpose of producing the article which is protected by the patent. Per se, it is simply a piece of wire bent in a particular way, and anybody, notwithstanding this patent, can produce that particular article, a piece of wire bent in that particular way. It seems to me therefore impossible to escape from the conclusion that the condition—in substance it is condition 1—the effect of which is to require the licensees to acquire these springs from the licensors, is necessarily unlawful by reason of the terms of the section. Consequently, the condition is null and void as being in restraint of trade and contrary to public policy. It follows that so far as the action asks for damages on the ground that spring forms have been purchased from other people, the action must necessarily fail. Let me pause here to say that the effect of that condition being void is that the defendants have what I may describe as in effect a gratuitous licence. They have got a licence, and the only obligation of substance placed upon them is to buy these spring forms at a particular price. That condition is void, and they have, in effect, a gratuitous licence. Then the plaintiffs say that they are entitled to call upon the defendants to stamp the number of the patent upon any article which is produced under this licence; and are entitled, accordingly, to go into the question and determine whether the various articles which the defendants have been dealing in are articles which do or do not come within the terms of the patent. Now a very curious position arises. The licensees are, of

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course—certainly so long as the licence subsists—not able to impeach the validity of the patent. It appears plain from the evidence before me that the defendants have been obtaining these particular articles from a firm of Dale & Co., which is in fact a firm mentioned in the licence and one of the firms to which a sub-licence was allowed to be granted. It is not suggested that any sub-licence has been granted to them, and in fact no sub-licence has been granted. Dale & Co. have therefore been producing the articles which the plaintiffs say the defendants ought to stamp with the patent number in accordance with the ninth condition of the licence. When the controversy began between the plaintiffs and the defendants, the defendants pointed out to the plaintiffs that the patent was apparently, having regard to the plaintiffs' claims, being infringed by Dale & Co., and they asked the plaintiffs, as they were entitled to do, under the terms of the licence, to sue Dale for infringement. Let us see what would have happened if the plaintiffs had sued Dale & Co. for infringement. The question of the validity of the patent would at once have come in issue, for Dale & Co., not being sub-licensees, were at liberty, which of course the defendants were not, to call in question the validity of the patent. I do not propose to read all the correspondence, but it is clear that the plaintiffs made up their minds that they would not sue Dale & Co. Notwithstanding that, it was equally clear and recognized by all parties that the defendants had the right to require the plaintiffs to sue Dale & Co. for the infringement or suspected infringement of their patent. Ultimately, the matter came to a head when the solicitors for the defendants wrote to the solicitors for the plaintiffs the letter of December 12, 1928. [His Lordship then read the letter of that date above set out and continued :] The answer to that is : "We are in receipt of your letter of December 12, but are unable to understand the somewhat curious complaint you make on behalf of your clients. However we are issuing a writ against your clients and this action will afford your clients the opportunity to include any grounds of complaint they may have in a counterclaim."

Apparently it occurred to the writer of that letter that this particular ground of complaint might be utilized not so much as a ground of complaint, but as a defence, and it is utilized in the defence in this way. The defendants say in para. 9: " Further or alternatively, the defendants say that by clause 7 of the licence the inventor was bound to commence and prosecute legal or other proceedings in respect of any infringement of the latters patent." By letters of July 13 and 14, 1928, the plaintiffs' solicitors alleged infringement and by letters of July 26, August 2 and December 12 the defendants' solicitors requested the plaintiffs to take such proceedings: but the plaintiffs refused, and failed either themselves to take or to authorize the defendants (in accordance with clause 7 of the licence) to take any proceedings. It is suggested that by such refusal or failure the plaintiffs wrongfully repudiated the terms of the licence, and now are estopped from complaining of the alleged or any breach on the part of the defendant or from recovering any damages or other relief.

The position, accordingly, is that the plaintiffs have been requested to carry out the obligation on their part contained in condition 7 of the licence. They have failed, and obviously quite deliberately, and it is easy to see why they have failed to carry out that obligation. Nevertheless, while refusing to carry out that obligation, they are suing under the licence for the relief I have mentioned, and they are saying they are still entitled to hold the defendants to the terms of the contract, one term of which they have themselves quite deliberately refused to carry out. Now, of course, it is elementary law that a mere failure by one party to a contract to carry out a term of that contract does not necessarily result in the contract ceasing to be one which he can enforce against the other party to the contract; it all depends upon the importance of the particular term of the contract which he has failed to perform. He is not allowed to hold the other party to the contract, while, at the same time, he is admitting that in something that goes to the root of the matter he has failed to carry out his obligations. It was put by counsel for the defendants in a way which seems to me to be accurate. The licensees here are, by entering into certain obligations, buying the right to a monopoly, a monopoly at all events in appearance. As one of the terms on which they agree to give a quid pro quo for the monopoly, they want to secure that they shall have a monopoly, and they insert and insist upon a most important term—namely, that the licensors shall do everything possible to protect that monopoly by preventing infringement. It seems to me that that term of the contract is one which goes to the root of it, and that if the plaintiffs are not prepared to carry out that part of the contract they cannot in fairness expect and are not entitled in law to expect the defendants to carry out their part of the contract. The matter is really one of substance in this particular case, because the truth of it is that the plaintiffs have got a patent as to the validity of which they have the very gravest doubts, and yet they are insisting upon this licence as against the defendants under which, assuming it to be effective, the defendants are put under certain obligations from which, if the patent is not valid, their competitors will be free. Commercially speaking, it seems to me that the clause in question which gives the right to the licensees to insist upon the plaintiffs suing infringers is of the utmost importance and is of the essence of the contract. The argument to the contrary, as I understand, is put in this way: that the plaintiffs are entitled to reply: "But you precluded yourselves from insisting upon that condition in the licence, because you yourselves are buying articles from the very firm who, it is believed, are infringing the patent." That seems to me to make the matter even more important for the defendants; and I confess I cannot appreciate how that can be an answer to the defendants' perfectly plain claim to require the plaintiffs to carry out the agreement which they, the plaintiffs, in the plainest language have entered into. Accordingly, it appears to me, having regard to what took place before the commencement of this action, that at the moment the action was commenced, the plaintiffs were seeking to enforce a contract which they themselves had in substance repudiated. That is a claim which, of course, the Court will not allow.

In these circumstances it seems to me, therefore, that not only is the first condition in the licence, as to the purchase of spring forms, void under the statute for the reasons I have already stated, but the plaintiffs have put themselves into a position in which they are not entitled to enforce this agreement; and, accordingly, the further relief which they seek in respect of the agreement is something which they have no right to ask the Court to give them. In order that there might be no misunderstanding and no possible hardship, while Sir Arthur Colefax was opening the case for the plaintiffs, I invited him to state in plain terms whether, even then, he desired to do that which of course would raise the question of invalidity—namely, sue Dale & Co., the infringers—and I suggested that, if at the eleventh hour the plaintiffs were desirous of doing that, the fair way of dealing with the position would be to let this action stand over and let the action be brought against Dale & Co., so that they would be performing their part of the contract, and it would be seen in due course what the effect would be. I think I ought to mention at this stage that there is a condition in the licence which provides that, in case the patent is held invalid, then the licence, at least as to certain rights, determines. However, as Sir Arthur Colefax was not prepared to take that course, he went on with the action.

There is only one other thing I want to say. It would have been open to me, of course, to have reserved my decision on those two points until the end of the case and to have allowed evidence to be called dealing with the question which the plaintiffs are anxious to litigate, as far as I can gather, without bringing in issue the question of invalidity—namely, the question whether the actual thing sold by the defendants is or is not within the terms of the licence, that is, an infringement of the letters patent. It is obvious that to try an infringement action in which the issue of invalidity cannot be raised, when there may be another action pending with regard to invalidity, is a very undesirable course, and I did

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not hesitate to indicate that, in my view, the proper way to deal with this case was to try these two points and to leave that matter to be dealt with on some subsequent occasion. If a different view is taken elsewhere on these two points which I have decided, it will be quite possible to have a new trial of this action and to have the matters determined on that issue; but I confess I thought it undesirable to take up public time by going into those matters until it had been determined that the plaintiffs are in a position to enforce this agreement. Accordingly, I dismiss the action.

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The plaintiffs appealed. The appeal was heard on January 22, 23, 1930.

Sir Arthur Colefax K.C. and *Eric Bousfield* for the appellants. The first question is whether the plaintiffs are prevented from suing for breach of the licence because of their alleged failure to sue Dale & Co. on the defendants' request or to authorize the defendants to do so. It is contended in the first place that there has been no breach of clause 7. The word used is not "authorize" but "permit" the defendants to sue at the plaintiffs' expense. All that is required in order to "permit" is that the plaintiffs should not prevent the defendants from suing in the plaintiffs' name, and this they did not do. But even if a breach was committed by the plaintiffs, this does not prevent their suing for breaches of clauses 1 and 9. The question whether the performance of a covenant on one side is a condition of enforcing covenants entered into by the other side is not to be ascertained by any technical rules but from the intention of the parties: *Boone* v. *Eyre* (1); *Campbell* v. *Jones* (2), where Lord Kenyon cited a passage from the judgment of Lord Mansfield in the first case as being to this effect: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual covenants; but where the covenants go only to a part, and where a recompense may be had in damages it is a different thing." In the present case a substantial part of the consideration passing from the plaintiffs to the defendants was the granting of the licence, and a breach of condition 7 does not prevent the plaintiffs from enforcing the performance of the defendants' covenants. The covenants are independent, and the performance of clause 7 was not a condition precedent to the plaintiffs' action for the defendants' breaches: *Stavers* v. *Curling* (1); *Pordage* v. *Cole* (2); *Graves* v. *Legg* (3); *Bettini* v. *Gye* (4); and see *Johnstone* v. *Milling* (5); *Surplice* v. *Farnsworth* (6); and *Hart* v. *Rogers* (7), which are cases in pari materia. Again, *Mills* v. *Carson* (8) is directly in point, and is a far stronger case than the present. The plaintiff's breach there was in not making payments necessary to keep the patent on foot, and yet he was held to be entitled to sue for royalties.

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(1) (1777) 1 H. Bl. 273*n*.

(2) (1796) 6 T. R. 570, 573.

Secondly, the condition requiring the licensees to buy the spring forms from the inventor does not come within the mischief of s. 38, sub-s. 1 (*b*), of the Patents and Designs Act, 1907. That sub-section relates to a licence to use and work an article, and the licence in this case was to "make, use, exercise and vend" the invention. This argument is not inconsistent with *Sarason* v. *Frénay*. (9) The language of the sub-section is so extraordinarily wide that it is important to give full effect to any limitation that can be inferred from the language used. The limitation of the application of the section to licences to use and work is significant. The sub-section is directed to preventing specific abuses, and its language should be read restrictively and not comprehensively. Regard can be had to the specific evil it was intended to prevent: *Eastman Photographic Materials Co.* v. *Comptroller-General* (10); *Hawkins* v. *Gathercole*. (11)

[LORD HANWORTH referred to *Viscountess Rhondda's Claim*. (12)]

(1) (1836) 3 Bing. N. C. 355.
(2) (1669) 1 Wms. Saund. 548, 549, 552.
(3) (1854) 9 Ex. 709, 716.
(4) (1876) 1 Q. B. D. 183.
(5) (1886) 16 Q. B. D. 460, 474.
(6) (1844) 7 Man. & G. 576.
(7) [1916] 1 K. B. 646, 651.
(8) (1892) 10 R. P. C. 9.
(9) [1914] 2 Ch. 474.
(10) [1898] A. C. 571.
(11) (1855) 6 D. M. & G. 1.
(12) [1922] 2 A. C. 339, 397.

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It is admitted that ultimately the construction must depend on the actual words of the section, but when these are general and ambiguous regard can be had to the evil against which they were directed to limit and define their meaning. Here, if s. 38 was given its widest construction, it would apply to practically all licences. The use of the expression "licence to use or work any patented article" suggests that the section is intended to apply to a more limited class—namely, licences to use a specified machine already in existence or in course of being made, and not licences to use articles in any number which the licence confers power to make: compare *Cutlan* v. *Dawson & Sons.* (1)

Graham Mould and *Trevor Watson* (*Sir Duncan Kerly K.C.* with them) for the respondents. Sect. 38, sub-s. 1 (*b*), of the Act of 1907 applies to this licence. It is a licence "to make, use, exercise and vend," and "exercise" must mean in regard to a patent the same as working the patent. It is therefore a licence "to use and work," and s. 38 does not apply to it.

[ROMER L.J. The distinction is here between a licence to use any article protected by a patent and a licence to use the invention.]

To speak of an article protected by a patent is only another way of speaking of the invention. The reason why s. 38 differs in this respect from the licence is that the definition of invention in s. 93 gives it the meaning of the newly invented article and not the product of that article. In this respect it differs from the Statute of Monopolies (21 Jac. 1, c. 3). Therefore the word "invention" could not be used in the Act of 1907 to mean the article produced under the patent as it is in the licence. The appellants' argument really amounts to a contention that there should be read into s. 38 after the expression "licence to use or work" the additional words "and not conferring any other power." There is no justification for this. The words used are clear and unambiguous, and there is no ground for limiting their meaning by reference to what is said to be the particular evil to be prevented. There remains the further question whether the appellants' failure to comply with clause 7 of the licence deprived them of the right to sue for alleged breaches of clauses 1 and 9. Clauson J. was right in holding that a failure to comply with clause 7 amounted to a repudiation of the contract. It is said that there has not been a breach of clause 7, and reliance is placed on the word "permit." Permission is not given unless it is signified to the person asking for it, and it was not enough for the appellants to remain passive. "Permit" in clause 7 is synonymous with "authorize." Therefore there has—as Clauson J. found—been a breach of clause 7, and that breach goes to the root of the whole contract. Although there are many authorities on the question of interdependent conditions, the question in each case whether they are interdependent must depend on the intention of the parties as gathered from the document. The test to be applied in such a case as this is to see whether the condition of which a breach has been committed is intimately connected with the main object of a licence—namely, to give an exclusive monopoly in consideration of a payment. So viewed clause 7 is not a mere collateral provision, but is designed to protect the exclusiveness of the licence. To lose this exclusiveness is to lose the main object of the licence. There might, it is true, be a sporadic or trivial infringement, but, if so, it might be held that clause 7 did not apply on the principle "de minimis non curat lex." But even a trivial infringement may have serious results as regards the monopoly by bringing into existence other infringers. Moreover a refusal to comply with clause 7 in regard to a trivial infringement might show that the licensors did not intend to implement their obligations, and that is what Clauson J. found here. A breach of this provision therefore goes to the root of the contract and amounts to a repudiation of the contract.

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(1) (1896) 13 R. P. C. 710.

[ROMER L.J. The covenant in clause 7 extends to a suspected infringement.]

Yes, but if the licensees were wrong in suspecting an infringement, the plaintiffs' failure to comply with clause 7 would not be a breach. The whole object of clause 7 is to

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preserve the exclusive monopoly, and that is vital to the whole licence. The breach of clause 7 results in the licensees getting something different from what they contracted for, which shows that it goes to the root or substance of the contract: *Bettini* v. *Gye* (1), and see per Fletcher Moulton L.J. in *Wallis, Son & Wells* v. *Pratt & Haynes* (2) in a dissenting judgment which was approved by the House of Lords. (3) *Mills* v. *Carson* (4) is distinguishable. It is true that the licensor had failed to pay the sums necessary to keep up the patent, but the licence contained no express covenant to do so.

Sir Arthur Colefax K.C. replied.

Cur. adv. vult.

1930. Feb. 19. LORD HANWORTH M.R. This is the plaintiffs' appeal from a judgment of Clauson J., who on November 28, 1929, dismissed the action. On April 30, 1919, letters patent No. 137,720 were granted to W. C. Huntoon for an invention of a collapsible tube for containing tooth paste, paint, or the like substances, having a closure cap attached to the tube by a wire loop—which has been referred to in the case as the "spring form"—hinged on the tube. By deed dated August 8, 1923, W. C. Huntoon granted to the defendants (inter alia) an exclusive licence under the letters patent for tubes intended to contain tooth paste or other preparations for the teeth for the unexpired residue of the term of the letters patent. By clause 13 of the licence the expression "inventor" was extended to and applied to the assignees of the inventor. No royalties were payable by the defendants under the licence, but the right to manufacture the spring form was reserved to the inventor, and the defendants agreed to purchase from the inventor all the spring forms required by them at a certain price, and subject to minimum orders to the extent of 20,000 gross per annum. Under clause 4 of the licence the defendants could grant sub-licences for the manufacture of the part of the patented tube, other

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(1) 1 Q. B. D. 183.
(2) [1910] 2 K. B. 1003, 1012.
(3) [1911] A. C. 394.
(4) 10 R. P. C. 9.

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than the spring form, to Betts & Co., Ld., and to the John Dale Manufacturing Company, and by letters dated August 8, 1923, between W. C. Huntoon and the defendants it was agreed that payment for spring forms should be based upon the quantity of tubes delivered to the defendants by the sub-licensees. On July 4, 1925, the letters patent were assigned to the plaintiffs subject to and with the benefit of the licence.

The plaintiffs alleged that during the year 1928 the defendants had been purchasing from the John Dale Manufacturing Company a slightly modified form of tube and cap, adapted for use with a modified spring form, and had obtained the spring forms for use with these modified tubes and caps from the said licensees or some source other than the plaintiffs; and further that these modified tubes, caps and spring forms had been made in accordance with the claims of the complete specification of the letters patent No. 137,720, and that the purchase of such spring forms from persons other than the plaintiffs was a breach of the terms of the licence. By clause 9 of the licence it was stipulated that no tubes should be sold or be permitted to be sold by the licensees without the words "Cap Patented No. 137,720" being stamped or printed on a prominent part of them; and by an amendment to the statement of claim the plaintiffs inserted a claim that in breach of this stipulation the defendants had sold the modified form of tube and cap without the words required by it being stamped or printed upon them. The plaintiffs, therefore, claimed (1.) A declaration that the modified form of tube referred to was made in accordance with the claims of the complete specification of the patent No. 137,720, and was thus within the terms of the licence above set out. (2.) An injunction restraining the defendants from purchasing or obtaining from persons other than the plaintiffs spring forms for use with tubes made under the licence. (3.) An injunction restraining the defendants from selling or offering for sale any tubes made in accordance with any of the claims of the complete specification of the patent No. 137,720 without the words above set out being stamped or printed on them, together with the usual consequential relief. The defendants in their defence traversed the plaintiffs' allegations and raised two points based upon the terms of the licence. The first, that the term thereby imposed upon the defendants that they should purchase all the spring forms required by them from the plaintiffs, was in restraint of trade and contrary to public policy and rendered null and void by s. 38 of the Patents Act, 1907. Secondly, that the plaintiffs had refused and failed to fulfil the terms of clause 7 of the licence, and had, by reason of such refusal and failure, repudiated the terms of the licence and were estopped from complaining of any breach of the licence on the part of the defendants and had become disentitled to any relief or damages in respect of the alleged breaches of the licence by the defendants. Clauson J. held in favour of the defendants on both points, and consequently dismissed the action with costs.

Turning, therefore, to the first point, it is contended by the plaintiffs that the licence is not within the opening words of s. 38: "Any contract made after the passing of the Act, in relation to the sale or lease of, or licence to use or work any article or process protected by a patent." The operative words of the licence are as follows: "The inventor doth hereby grant . . . . the full sole and exclusive liberty right licence powers and authority . . . . to make use exercise and vend the said invention." It is said that the words of the statute "use or work any article" do not cover the words "use, exercise, and vend (an) invention." I cannot accept this argument. The claims in the patent are for an article—a collapsible tube with certain characteristics. The tube made in accordance with the claims is the invention. The specification runs: "This invention relates to certain new and useful improvements in collapsible tubes"—"a characteristic feature of the present invention resides in the formation or mounting of the hinge knuckle or knuckles on the tube," and the licence is to make, use, exercise (which is equivalent to work) and vend the said invention; that is to say, tubes with the characteristics of the invention embodied in them.

Nor can I agree with the other contention that the section only contemplates an ascertained article existing and complete which is protected as the product of a patented process. It is said that some guidance can be found from sub-s. 5 of s. 38, whereby a condition inserted in a contract reserving to the licensor the right to supply such new parts of the patented articles as may be required to keep it in repair, is excepted from the prohibition of s. 1; but I see no reason to cut down the terms of the prohibition in s. 1, because the exception to it relates to parts and parts only of a patented article. The exception may be small and narrowed. That does not necessarily narrow the prohibition from which is to be deducted a narrow exception. There is force in Mr. Trevor Watson's argument that s. 93 of the Patents Act interprets "invention" as including any manner of new manufacture the subject of letters patent, within s. 6 of the Statute of Monopolies; and that if the word be read with that meaning in the licence, then the licence is just such a contract as falls within sub-s. 1 of s. 38 of the Patents Act. The argument that the prohibition does not cover what may be, or may become, an ingredient in the patented articles was rejected in the case of *Sarason* v. *Frénay* (1), where it was held that the words of the section must be read according to their ordinary interpretation; and when so read it is plain that clause 1 of the licence is covered by them.

After coming to this conclusion there can be no question that clause 1 of the licence is rendered null and void. That clause ties the licensee to the licensor in the purchase of the spring forms. The spring form is not of itself protected by the patent, and sub-clauses (*a*) and (*b*) of s. 38, sub-s. 1, both apply, the former to the user of an article supplied by any one but the licensor, and the latter to the purchase of an article from any one but the licensor. I therefore come to the same conclusion and agree with Clauson J. upon this point.

The next question is as to the repudiation of the contract by the plaintiffs by reason of their failure to carry out the terms of clause 7 of the licence. On this point Clauson J.

(1) [1914] 2 Ch. 474.

did not have the advantage of the argument that has been addressed to this Court. The relevant facts have been recounted by Clauson J. and it is unnecessary to repeat them. Shortly put they amount to this, that by a letter dated December 12, 1928, the defendants demanded that pursuant to clause 7 of the licence the plaintiffs should take proceedings against the John Dale Manufacturing Company, from whom the defendants were obtaining their tubes, to restrain the infringement, if infringement it be, of the plaintiffs' patent No. 137,720, and thus raise the issue whether the articles supplied by the John Dale Manufacturing Company were covered by the licence granted to the defendants. In their reply of December 14, 1928, the plaintiffs declined to take the suggested proceedings, and instead announced their intention to issue the writ in the present action, which is dated December 19, 1928. This refusal of the plaintiffs to proceed or to permit proceedings to be taken under clause 7 has been held by Clauson J. to connote a repudiation of the licence by the plaintiffs, because he held that that term is one "which goes to the root of it, and that if the plaintiffs are not prepared to carry out that part of the contract, they cannot in fairness expect and are not entitled in law to expect the defendants to carry out their part of the contract."

The question, therefore, is whether the clauses 1 and 9 which the plaintiffs seek to enforce against the defendants are interdependent upon the duty imposed upon the plaintiffs under clause 7 of the licence. The rule of law stated by Lord Mansfield in *Boone* v. *Eyre* (1) as cited in *Campbell* v. *Jones* (2) is as follows: "The distinction is clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions; but where the covenants go only to a part, and where a recompense may be had in damages, it is a different thing." Our attention was called to a number of authorities which illustrated the application of this rule. In *Graves* v. *Legg* (3) Baron Parke added that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument and from the circumstances legally admissible in evidence with reference to which it is to be construed—" one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration." This passage was approved by Blackburn J. in *Bettini* v. *Gye*. (1) The learned judge says that in applying Baron Parke's rule the Court, in the absence of an explicit declaration, is to look at the whole contract to see whether the stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from that stipulated for, or whether it merely partially affects it and may be compensated for in damages.

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(1) 1 H. Bl. 273*n*. (For Lord Mansfield's actual words see p. 558 post.)

(2) 6 T. R. 570, 573.

(3) 9 Ex. 709, 716.

Applying the above rules to the present contract, it is to be observed that the licensee is by clause 4 empowered to grant sub-licences, and by clause 5 cannot during the continuance of the licence dispute the validity of the patent, while the licensor by clause 6 is to pay the renewal fees, and by clause 7 to defend any proceedings for the revocation of the patent. By clause 8 there is a mutual clause as to future improvements. By clause 10 there is power given to the inventor to determine forthwith the licence upon failure of the licensee to make good breaches or defaults of which he has been served with notice, or within six months, if he is desirous of manufacturing tubes under the letters patent. It appears to me that the intention of the parties to be gathered from the agreement is not to make the taking of proceedings by the plaintiffs under clause 7 vital to the rest of the obligations on the part of the defendants, or that upon the plaintiffs' failure to implement clause 7 the performance of the rest of the contract by the defendants is a thing different in substance from what the defendants stipulated for.

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(1) 1 Q. B. D. 183, 188.

In *Mills* v. *Carson* (1) the fees for the renewal of a patent had not been paid, and the defendant had failed to pay the royalties due under his covenant contained in the licence to him. The Court of Appeal held that assuming the non-payment of the renewal fees was to be imputed to the plaintiff, and that he had thereby caused a breach of his covenant for quiet enjoyment, yet nevertheless the defendant was not released from the payment of the royalties, because the two covenants were not expressly conditional, and were not so co-extensive that it could be implied that the one covenant was conditional on the other. So in the present case I am of opinion that the failure on the part of the plaintiffs to take or permit proceedings under clause 7 has not released the defendants from their obligations under the licence. In this view it is difficult to hold that the plaintiffs repudiated the contract in toto by their refusal to respond to the demand of the defendants expressed in their letter of December 12, 1928. On this question the words of Bowen L.J. in *Johnstone* v. *Milling* (2) are important. In considering the question whether the doctrine of *Hochster* v. *De la Tour* (3) as to an anticipatory breach can be applied, he says that to find that it does apply "it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention." In the present case the plaintiffs' attitude expressed in their reply of December 14 to the letter of December 12 is, so far from repudiating the contract, that they are issuing a writ based upon it, and "this action will afford your clients the opportunity to include any grounds of complaint that they may have in a counterclaim."

For these reasons I am of opinion that the appeal fails upon the first point and succeeds upon the second. The order of Clauson J. should therefore be discharged and the action remitted to the Court below for trial of the question whether the defendants have committed a breach of the covenant contained in clause 9 of the licence. There should I think be no order made as to the costs of the appeal. Inasmuch as the plaintiffs' action would rightly have been dismissed with costs, if no breach of the covenant should appear to have taken place, the costs already incurred in the Court below should I think be dealt with by the learned judge on the further hearing.

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(1) 10 R. P. C. 9.

(2) 16 Q. B. D. 460, 474.

(3) (1853) 2 E. & B. 678.

The decision of this Court upon the validity of clause 1 of the licence does not appear to affect the issues now remaining between the parties; but if it does there will be liberty to amend the pleadings accordingly, and any costs occasioned thereby will be dealt with by the judge at the trial.

LAWRENCE L.J. The issue raised by the allegation in the defence that the articles sold by the defendants were not made in accordance with the plaintiffs' patent and consequently did not come within the scope of the licence of August 8, 1923, was not decided or gone into by Clauson J. For the purpose of this appeal, therefore, it must be assumed that the articles in question were articles sold under the licence.

The first question to be determined on this assumption is whether the condition in clause 1 of the licence that the defendants should buy from the plaintiffs all the spring forms required for the manufacture of the patented articles is a valid condition or whether it is void under s. 38 of the Patents and Designs Act, 1907. The plaintiffs' invention relates to constructional improvements in collapsible tubes having means of hingedly connecting the closure cap to the tube to prevent loss or mislaying of the cap and having a swivel connecting with the cap so that the latter may readily be rotated to engage its threads with those on the tube. The plaintiffs' specification shows that the article protected by the patent consists of a combination of three separate parts—namely: (1.) a collapsible tube provided with a hinge knuckle or hinge knuckles; (2.) a closure cap; and (3.) a spring form. None of these parts by itself is protected by the patent.

The licence is an exclusive licence to make, use, exercise and vend the invention, excluding from the licence and reserving to the inventor the sole right to manufacture the spring forms, and by clause 1 the inventor agrees to sell and the licensee agrees to buy from the inventor all the spring forms which may be required for the manufacture of the patented articles under the licence upon certain terms therein mentioned. Sect. 38 enacts (inter alia) that it shall not be lawful in any contract in relation to a licence to use or work any article protected by a patent to insert a condition the effect of which will be to require the licensee to acquire from the licensor or his nominees any article or class of articles not protected by the patent, and that any such condition shall be null and void as being in restraint of trade and contrary to public policy. The plaintiffs contended that because the licence included a licence to make the patented articles, as well as to use them, it did not come within the scope of the section. It is true that the section has no application to a licence to manufacture a patented article, but if such a licence is combined with a licence to use the article, I find it impossible to escape from the conclusion that the licence is a contract made in relation to a licence to use a protected article within the meaning of the section. The burden of the plaintiffs' argument was that a licence to make, use, exercise and vend an invention does not come within the mischief aimed at by the section, and therefore ought to be held to be excluded from its operation. They contended that the section, as applied to a licence to use a patented article, should be construed as being confined to a licence to use some specific article or articles in existence at the date of the licence (such as a machine required by the licensee for use in his factory) and not as extending to a licence to use an indefinite number of articles to be manufactured under the licence for the purposes of being used and sold in the course of the licensee's business. In support of that contention the appellants relied on the fact that in the section the licence to use or work a patented article is associated with the sale or lease of such an article and on the fact that the section does not refer or extend to a licence for the manufacture of such an article.

It is well settled that the intention of the Legislature must be gathered from the language used to express it. It is possible that the promoters of the Act may have had more prominently in their minds licences to use articles of the kind suggested by the plaintiffs, but the section is not in terms limited to such licences. No doubt where the language of an enactment is capable of bearing more than one meaning or where if construed literally it would lead to absurd results, it is proper that the Court should ascertain the true intention by acquainting itself with the law which existed before the Act was passed and what was the mischief which was thereby intended to be remedied: see *Eastman Photographic Materials Co.* v. *Comptroller-General.* (1) In the present case, however, the language of the section is plain and specific. The Court is not considering a case in which it is sought to limit the complete generality of general words in an Act and therefore the principles laid down in *Hawkins* v. *Gathercole* (2) (recognized by Lord Wrenbury in *Viscountess Rhondda's Claim* (3)) have no application. Moreover the mischief said to be aimed at by the section was only stated by counsel in general and somewhat vague terms, without placing before the Court the necessary materials for ascertaining its precise nature and extent. So far as I am able to judge on the present materials there is nothing which places the condition in the licence outside the mischief which on the wording of the section the Legislature seems to have intended thereby to remedy—namely, that a patentee when granting a licence to use an article protected by a patent should not attach a condition that the licensee should buy from him some article not so protected. As pointed out by Warrington J. in *Sarason* v. *Frénay* (4) there is nothing whatever said in the section about the purpose for which the unprotected article when acquired is to be used. The view against the plaintiffs' argument in the present case is, in my opinion, strengthened by clause (*d*) of sub-s. 5, which shows that the Legislature contemplated that a condition in

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(1) [1898] A. C. 571.
(2) 6 D. M. & G. 1.
(3) [1922] 2 A. C. 339, 397.
(4) [1914] 2 Ch. 474, 481.

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a licence to use a patented article requiring the licensee to buy new parts required for repairing the article from the licensor would, but for that clause, come within clause (*b*) of sub-s. 1. The reason for the omission from the section of a contract in relation to a licence to manufacture a patented article may be explained on the ground that such a licence does not necessarily confer on the licensee the right to use the article manufactured under the licence and that in a licence merely to manufacture a patented article the Legislature considered such a condition as is prohibited by sub-s. 1 unobjectionable. When, however, the licence is a licence to manufacture and use the patented article it seems to me to come within the letter and spirit of the section. Although the case of *Sarason* v. *Frénay* (1) was concerned with a licence to use or work a patented process such a licence is, in my opinion, closely analogous to a licence to make and use an article of commerce like the one in question in the present case. There pyrophosphates formed an essential ingredient in the patented process and were required whenever the process was used. It was contended that in these circumstances the prohibition in the section did not apply but this contention was rejected by Warrington J. and the Court of Appeal and it was held that a condition requiring the licensee to purchase the pyrophosphates from the licensor was void under the section. In the present case a spring form which by itself is not protected by the patent is an essential part of the patented article and is required for the use of every such article. In these circumstances I am of opinion that the reasons upon which the decision in *Sarason* v. *Frénay* (1) were based apply equally to the facts of the present case.

Some point was sought to be made of the fact that the licence is a licence to use the invention and not a licence to use an article protected by a patent. In my opinion there is nothing in this point. The invention consists of an article, and when the licence speaks of the right to manufacture, use and vend the invention it obviously means the right to manufacture, use and vend the patented article.

(1) [1914] 2 Ch. 474.

In the result I am of opinion for the reasons stated that the licence of August 8, 1923, is a contract in relation to a licence to use an article protected by a patent within the meaning of sub-s. 1 of s. 38 of the Act of 1907 and consequently that clause 1 of the licence is void as being in restraint of trade and contrary to public policy.

The plaintiffs, however, further allege that the defendants have committed a breach of clause 9 of the licence by selling tubes coming within the scope of the licence without the words " Cap patented No. 137,720 " being stamped or printed on them. On the assumption that the tubes sold by the defendants came within the licence, it is plain that the defendants have committed a breach of this clause and their only defence is that the plaintiffs have themselves committed a breach of clause 7 of the licence and are therefore not entitled to sue the defendants for their breach of clause 9. This defence raises two questions—namely: (1.) Have the plaintiffs committed a breach of clause 7? and (2.) If so, does such a breach preclude them from enforcing clause 9?

Clause 7 provides that the licensor shall at all times during the continuance of the licence at the request of the licensee commence and prosecute all legal or other proceedings in respect of any infringement or suspected infringement of the plaintiffs' patent or permit the licensee to do so in the name and at the cost of the licensor. On December 12, 1928, the defendants, by a letter written on their behalf by their solicitors, required the plaintiffs (if they persisted in their allegation concerning an infringement or even a suspected infringement) to take the necessary proceedings forthwith or permit the defendants to do so in the plaintiffs' name and at their cost. The plaintiffs did not comply with this request but issued their writ in this action on December 19, 1928. Sir Arthur Colefax contended that at the date when the writ was issued the plaintiffs had not committed any breach of clause 7, because that clause gave them an option either to commence legal proceedings themselves or to permit the defendants to do so and that, as the latter alternative did not require them to give any express authority and as they had not prevented the defendants from taking legal proceedings, they had not committed any breach of that clause. He further contended that clause 7 did not apply to a case such as the present where the infringement had taken place at the request of the defendants.

In my opinion a stipulation that one party to a contract should at the request of the other permit that other to take legal proceedings in the name and at the cost of the former, implies that the party in whose name and at whose cost the proceedings are to be taken should when requested give express permission to the other party to take such proceedings and should not merely pass by such request in silence. I therefore think that the plaintiffs are wrong on the first point taken by them.

The further point that clause 7 was not intended to apply in the circumstances is more doubtful. I cannot shut my eyes to the fact that the request made by the defendants that permission should be granted to them to take legal proceedings for infringement against the manufacturers from whom they had ordered the articles cannot have been meant seriously. Such proceedings would have had no chance of success directly it was ascertained that they had been instituted and were being carried on by the defendants. On the whole, however, I have come to the conclusion that a technical breach has been committed by the plaintiffs, though there is no evidence that the defendants were desirous of availing themselves of such a permission or would have done so, if it had been granted, and it would be extremely difficult, if not impossible, to prove that they have suffered any damages owing to such breach. Further I do not think that the plaintiffs are to blame for not themselves taking legal proceedings for infringement against the manufacturers. In the first place the manufacturers were acting under orders from the defendants and were therefore not the principal offenders, and in the next place the manufacturers would, in view of the conclusion of the Court on the main point, have had a complete answer to such an action under sub-s. 4 of s. 38: see *Sarason* v. *Frénay*. (1)

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(1) [1914] 2 Ch. 474.

There remains the question whether such breach precludes the plaintiffs from enforcing their rights under clause 9. The learned judge has held that the obligation undertaken by the plaintiffs in clause 7 goes to the root of the contract, and that therefore the defendants can treat the breach of that obligation as a repudiation by the plaintiffs of the whole contract. With the greatest respect for the learned judge I do not agree with that conclusion. The question whether the performance of a stipulation on the part of one party is dependent upon or independent of the performance of a stipulation on the part of the other party is no doubt a difficult one. As a general rule there is no question that, if the two stipulations are independent of each other, one party may bring an action for breach against the other, notwithstanding that he may himself have committed a breach of the stipulation which he had to perform: see the notes to *Pordage* v. *Cole* (1), where this subject is discussed at length. The question whether performance or readiness to perform upon either side is a condition precedent to the right to enforce performance on the other must be solved not by any technical rules, but by ascertaining the intention of the parties to be collected from the instrument and such surrounding circumstances as are legally admissible in evidence with reference to which it is to be construed: see notes to *Cutter* v. *Powell* (2) and *Bettini* v. *Gye*. (3) In the latter case Blackburn J., in delivering the judgment of the Court, after stating that in the contract there in question there was no express declaration of the intention of the parties either way, states: "And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Baron Parke to be acknowledged" (in *Graves* v. *Legg* (4)), "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for; or whether it

(1) 1 Wms. Saund. 548.

(2) (1795) 6 T. R. 320; 2 Smith's L. C. 1.

(3) 1 Q. B. D. 183, 188.

(4) 9 Ex. 709, 716.

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merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent."

It is well settled that, where a covenant goes only to part of the consideration on both sides and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without the plaintiff averring performance or readiness to perform his part of the contract: see *Boone* v. *Eyre* (1), where Lord Mansfield said: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages" it is a different thing: and see also *Campbell* v. *Jones* (2), and the judgment of Fletcher Moulton L.J. in *Wallis, Son & Wells* v. *Pratt & Haynes* (3), approved in the House of Lords. (4)

Applying these principles to the contract in the present case, it is to be observed that clause 7 makes no distinction between trivial infringements and material infringements, nor between infringements brought about or encouraged by the defendant for his own benefit, and infringements not so brought about or encouraged. Moreover the clause extends to suspected infringements. Although the intention of the parties has to be gathered from the contract as a whole and not from the effect of the breach which has in fact taken place, yet in ascertaining whether a particular stipulation in a contract goes to the root of it, it is of the first importance to see whether any breach of it would necessarily destroy the substance or foundation of the contract. It is obvious that neither a trivial breach nor a breach instigated or encouraged by the defendants for their own benefit, nor suspected breach, where the suspicion turned out to be unfounded, would have any such effect. Taking the present

(1) 1 H. Bl. 273*n*.
(2) 6 T. R. 570.
(3) [1910] 2 K. B. 1003, 1013.
(4) [1911] A. C. 394.

case where the defendants themselves gave the order for the articles which are alleged to constitute the infringement, it would be strange if they could rid themselves of their obligation under the licence because the licensor did not give them permission to take proceedings against the firm when they had ordered the infringing articles, the only result of which action would be its dismissal with costs which the licensor would have to pay. On the whole I have come to the conclusion that the plaintiffs' agreement in clause 7 to take or to permit to be taken the legal proceedings there mentioned, and the defendants' agreement in clause 9 to mark the tubes, were independent agreements, and that the performance by the defendants of the latter agreement was not impliedly conditional on the performance by the plaintiffs of the former.

There are no doubt cases (such as for instance the *General Billposting Co., Ld.* v. *Atkinson* (1)) which the Courts have decided on broader lines than those laid down in the notes to *Pordage* v. *Cole* (2) as to mutual and independent covenants, and to which the true test applied has been whether the acts and conduct of the plaintiff have evinced an intention no longer to be bound by the contract. In my opinion however the facts of this case do not bring it within the principle laid down by those cases. The failure by the plaintiffs to take legal proceedings for infringement or to permit the defendants to take such proceedings in the special circumstances of this case did not evince an intention on their part to be no longer bound by the licence, nor did it justify the defendants in treating themselves as absolved from the further performance of their obligations under the licence. If the present case had been a case where the plaintiffs had refused to take or permit the defendants to take proceedings in respect of infringements which if continued would have destroyed or materially lessened the value of the monopoly granted to the defendants, it may well be that the principle recognized in the *General Billposting Co.'s* case (1) would have applied, and that the plaintiffs would have disentitled themselves from suing for any breach on the part of the defendants. The learned judge has evidently taken the view that the plaintiffs' patent, if challenged in the Courts, would probably be held invalid for want of subject-matter, and that, as the defendants are precluded from challenging its validity, it would be unfair to them to try the question whether the tubes sold by them came within the licence. In my judgment this consideration ought not to weigh with the Court in deciding whether the plaintiffs' breach of clause 7 goes to the root of the contract. The defendants have thought it worth their while, as a business proposition, to take a licence from the plaintiffs, knowing that thereby they would preclude themselves from disputing the validity of the patent. They are still at liberty to contest the question whether the particular collapsible tubes complained of come within the licence or not, and it seems to me that the Court is bound to adjudicate upon that question. Although the action on this issue resembles somewhat closely an action against an infringer who does not dispute the validity of the patent but denies infringement, it is not in any sense an action for infringement, as the defendants being licensees cannot be infringers, and the only question to be determined is whether assuming the patent to be valid the tubes sold by the defendants come within the ambit of the claims in the plaintiffs' specification and therefore are within the licence. There can be no hardship on the defendants in having that question decided in this action.

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(1) [1909] A. C. 118.

(2) 1 Wms. Saund. 548.

In the result, for the reasons stated, I am of opinion that the appeal fails on the first, but succeeds on the second point, and I agree that an order to the effect stated by the Master of the Rolls should be made on this appeal.

ROMER L.J. The appellants (plaintiffs in the action in the Court below) charge the respondents with having committed a breach of two of the covenants on their part contained in the licence of August 8, 1923. The learned judge in the Court below did not decide the question whether the defendants had in fact committed the breaches alleged, and, indeed, no evidence was adduced upon such question, inasmuch as the learned judge dismissed the plaintiffs' action on the ground that, as regards one of such covenants, it was invalidated by s. 38 of the Patents and Designs Act, 1907, and that, as regards both covenants, the plaintiffs were disentitled to sue by reason of a breach on their part of one of their covenants contained in the licence. The question that arises upon this appeal is whether the learned judge was right in dismissing the action on those grounds.

Dealing first with the question that arises under s. 38 of the Patents and Designs Act, 1907, it is to be observed that the licence is an exclusive licence granted to the licensee "to make, use, exercise and vend the said invention," with certain words of exclusion which are not material for the present purpose, and the first matter that has to be determined is as to whether this licence is or is not a contract made in relation to a licence to use an article protected by a patent within the meaning of sub-s. 1 of s. 38. There can be no doubt but that the licence entitles the defendants to make an article protected by a patent—namely, any of the collapsible tubes comprised in the various claims in the claiming part of the specification of the plaintiffs' patent. There can also be no doubt that the patented articles so made can be used by the defendants. But the right so to make the articles and the right so to use them are derived from the licence and from the licence alone. This being so, it seems to me that the licence, though it may be a licence to do other things as well, is certainly a licence to use the articles protected by the plaintiffs' patent, and is accordingly one of the contracts mentioned in sub-s. 1 of s. 38. Now that contract contains a condition requiring the licensee to acquire from the licensor the spring forms required for the manufacture of the collapsible tubes, and those spring forms are articles not protected by the patent. The condition, therefore, would seem to come within the language of the Act and to be null and void. It is said, however, on the part of the appellants that, though the language of the section may be wide enough to bring within its operation the licence of August 8, 1923, yet the Court should give a narrower construction to the section and treat it as only referring to a licence to use some specified article or articles already in existence at the date of the contract, and that it ought not to be treated as referring to any licence which confers expressly or by implication a right to make an article protected by a patent. For myself, I am unable to find any justification in the section itself for putting such a limitation upon the language used. It may not appear very clear why the Legislature should have made the provisions of sub-s. 2 and of sub-s. 5 (*d*) applicable to a licence to "make, use, exercise and vend the invention," but there is nothing in those provisions which is incapable of being applied to such a licence.

It is then contended that the section should be so construed as to confine its operation to cases which are within the mischief which the section was passed to remedy. For myself, I know nothing of the mischief which the section was intended to remedy other than what I am able to gather from the words of the section itself. These would seem to suggest that the object of the Legislature was to prevent persons who had obtained a monopoly in respect of an article or a process by means of a patent, so using that monopoly as to obtain for themselves a virtual monopoly in respect of other articles and processes for which they have not obtained any patent. It is admitted that the section was intended to prevent the owner of a patent from granting a licence to use a machine made by him under his patent on the terms that the licensee should acquire from him some other article. It would however seem to be just as objectionable for a patentee to grant a licence to manufacture and use a machine made under his patent on a similar condition. Certainly for myself I can see no reason why the Legislature should permit the condition in the second case and refuse to permit it in the first. The Legislature, as I read the words of the section, has used words wide enough to cover the second case, and I can find no reason based upon a consideration of the mischief which the section was aimed at for not giving effect to those words.

The first covenant sued upon by the plaintiffs, being therefore in my opinion an invalid covenant, as held by the learned judge, the only question remaining to be decided is as to whether the plaintiffs are debarred from suing upon the second covenant by reason of the breach on their part of the covenant by them contained in clause 7 of the licence, assuming such a breach to have been committed.

Now the second covenant sued upon is one which prohibits the licensees from selling or permitting to be sold under the licence tubes without the words "Cap Patented No. 137,720" being stamped or printed thereon. The covenant of which it is alleged the plaintiffs have committed a breach is in these terms: "The inventor shall at all times during the continuance of this licence at his own cost defend every proceeding for the revocation of the said letters patent and at all times aforesaid at the request of the licensee commence and prosecute all legal or other proceedings in respect of any infringement or suspected infringement of the said letters patent or permit the licensee to do so in the name and at the cost of the inventor," and the point that has to be determined is this: Is the covenant by the licensee contained in clause 9 dependent upon the performance by the licensors of their covenant contained in clause 7? Upon this question I find myself unable to agree with Clauson J.

The question whether two covenants not expressly made interdependent are nevertheless to be treated as being so, has frequently come before the Courts, and, as I read the authorities, the test to be applied is this: would every breach of the one covenant necessarily go to the root of the other covenant in the sense of substantially depriving the second covenantor of the consideration for the future performance by him of his own covenant? In *Campbell* v. *Jones* (1) the plaintiff, who was the owner of a patent for bleaching material, in consideration of one entire sum of 500*l.* had agreed that he would instruct the defendant in the art of bleaching materials for making paper and permit him during the period of the patent to bleach such materials according to the specification.

(1) 6 T. R. 570.

The consideration therefore for the promise by the defendant to pay the 500*l.* was twofold, consisting of: (1.) the permission to bleach materials under the patent, and (2.) the promise by the plaintiff to teach him how to do so. The plaintiff failed to perform his promise as regards teaching the defendant, but was nevertheless held entitled to sue for the 500*l.*, so far as it had not been paid, on the ground that his failure did not substantially deprive the defendant of the consideration for his covenant to pay.

It would further appear, however, that it is not sufficient, to make the covenants interdependent, that a particular breach of the one covenant may deprive the other covenantor of the consideration for the further performance on his part of his own covenant if other breaches would not have that effect. This was clearly laid down by this Court in *Mills* v. *Carson* (1), a case that does not appear to have been brought to the notice of the learned judge. That case had to deal with a licence under which the licensee had covenanted to make periodical payments, and the licensor was held entitled to sue the licensee upon such covenant, notwithstanding the fact that he himself had committed a breach of his covenant for quiet enjoyment, which breach in effect had resulted in the patent coming to an end. It was pointed out by the Court of Appeal that there might be breaches of the covenant for quiet enjoyment of such a nature that the licensee would not be thereby deprived of the consideration for his covenant to pay. Had the covenant in that case been a covenant to keep the patent in full force, it might well have been held, as I read the judgments, that the covenant to pay was dependent upon the performance by the licensor of his covenant.

Now in the present case it will be observed that the licensor agrees to take proceedings not only in respect of any infringement, but also in respect of any suspected infringement of the patent, or permit the licensee to do so. Inasmuch as the covenant is one inserted obviously for the benefit of the licensee, the word "suspected" must I think mean "suspected by the licensee." Now suppose that the licensee had

(1) 10 R. P. C. 9.

a bona fide suspicion that the patent was being infringed but that the licensor refused nevertheless to fulfil his covenant, could it be said that such a breach by him of his covenant went to the root of the licensee's covenant contained in clause 9 should it subsequently appear that the licensee was mistaken in his suspicion and that no infringement had ever taken place? This question must, it seems to me, be answered in the negative and, if that be so, it is not in my opinion possible to say that every and any infringement by the licensor of his covenant contained in clause 7 goes to the root of the covenant by the licensee contained in clause 9 by depriving him of the consideration for the future performance by him of that clause, although I agree that the consideration for the performance by the licensee of that covenant and all other covenants of the licensee was the exclusive right granted to him by such licence, and that certain breaches by the licensor of his covenant contained in clause 7 would render that exclusive right perfectly valueless.

For these reasons I come to the conclusion that the two covenants are not interdependent and that the plaintiffs are entitled to sue the defendants for any breach that may have occurred of the covenant contained in clause 9.

In my opinion the appeal fails upon the first point and succeeds upon the second. The order of Clauson J. should therefore be discharged with the consequences stated by the Master of the Rolls.

Solicitors: *Lawrance, Messer & Co.; Mawby & Barrie.*

H. C. G.

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NIXON *v.* ATTORNEY-GENERAL.

[1928. N. 944.]

Superannuation—Allowances—Civil Service—Rights of Civil Servants under Superannuation Acts—Jurisdiction of Civil Courts—Power of Court to make Declaration of Right—Alleged Formation of Contract with Civil Servant based on Treasury Minute—Superannuation Act, 1834 (4 *&* 5 *Will.* 4, *c.* 24), *ss.* 13, 27, 30—*Superannuation Act*, 1859 (22 *Vict. c.* 26), *ss.* 2, 12, 17—*Superannuation Act*, 1909 (9 *Edw.* 7, *c.* 10), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1; *s.* 4—*Metropolitan Police Courts Act*, 1897 (60 *&* 61 *Vict.* c. 26)—*Telephone Transfer Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 26), *s.* 6—*R. S. C., Order* xxv., *r.* 5.

An established civil servant of the Crown has on the true construction of the Superannuation Acts, 1834 to 1909, no legal right to a superannuation allowance or, when such an allowance has been awarded to him by the Lords Commissioners of the Treasury, to an allowance of an amount fixed by reference to the scale contained in s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909.

Cooper v. *The Queen* (1880) 14 Ch. D. 311 and *Yorke* v. *The King* [1915] 1 K. B. 852, which were approved by Lord Buckmaster and Lord Loreburn in *Considine* v. *McInerney* [1916] 2 A. C. 162, and by the Privy Council in *Wigg* v. *Attorney-General for Irish Free State* [1927] A. C. 674, 678, and in *In re Transferred Civil Servants* (*Ireland*) *Compensation* [1929] A. C. 242, 255 followed.

Dicta of Cozens-Hardy M.R. and Fletcher Moulton L.J. in *In re Lupton* [1912] 1 K. B. 107, 114, 115 not followed.

The plaintiffs Nixon, Clarke and Samuel respectively entered the Civil Service in 1877, 1882 and 1880, and subsequently each of them adopted the provisions of the Superannuation Act, 1909, pursuant to s. 3, sub-s. 1. Nixon in 1883 was transferred from the Home Office to the Metropolitan Police Courts Department, in which he remained till his retirement in 1922. Clarke and Samuel retired in 1922 and 1925 respectively. The plaintiff Scott entered the service of the National Telephone Co., Ld., in 1895, and on the transfer of the telephones to the Post Office under the Telephone Transfer Act, 1911, he assigned his share in a contributory pension fund to the Postmaster-General, and was appointed to a pensionable office in the Post Office and became entitled to a superannuation allowance under s. 6 of that Act, which by s. 10 had to be read as one with the Superannuation Acts, 1834 to 1909. The Treasury Commissioner, purporting to act in accordance with a Treasury minute dated March 20, 1922, awarded to each of the plaintiffs a superannuation allowance computed upon a footing differing from and less favourable than that provided by s. 2 of the Act of 1859 as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909.

In an action by the plaintiffs claiming to have their superannuation allowances computed on the more liberal scale and to have the application of the minute of March 20, 1922, declared ultra vires:—

Held, by the Court of Appeal (affirming Clauson J.):

(1.) That the plaintiffs had no legal right enforceable in a Court of law to superannuation allowances calculated according to the scale fixed by s. 2 of the Act of 1859 as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909.

(2.) That, although on the evidence two of the plaintiffs had entered the Civil Service in reliance on a statement as to superannuation allowances contained in a Treasury minute dated June 14, 1859, which was published in the Civil Service Year Book and there seen by them, no contract was thereby created conferring an enforceable right to a superannuation allowance on the scale therein mentioned. The minute was not issued as the basis of a contract and the Civil Service Year Book was not published by the authority of the Treasury.

(3.) That the plaintiff Scott was not given by the Telephone Transfer Act, 1911, a legal right to a superannuation allowance.

Per Clauson J. The power of the Court to make a declaratory order in regard to rights extends only to rights legally enforceable.

As regards any legal right to an allowance, the plaintiff Nixon was not in any better position under the Metropolitan Police Courts Act, 1857, than that of the other plaintiffs.

Witness Action.

The plaintiffs were four retired civil servants of the Crown. The plaintiff John Nixon who entered the Home Office in 1877 was transferred in 1883 to the Metropolitan Police Department and retired in 1922. The plaintiff John Scott entered the service of the National Telephone Company in 1895 and contributed to the pension fund until January 1, 1912, when, under the provisions of the Telephone Transfer Act, 1911, he became a transferred officer and having assigned his share in the company's pension fund to the Postmaster-General was appointed to a pensionable office, which qualified him for a superannuation allowance under the Superannuation Acts, 1834 to 1909; he retired in 1927. The plaintiff William Clarke entered the Civil Service in 1882 and retired in 1922. The plaintiff Benjamin Louis Samuel entered the Civil Service in 1880 and retired in 1925.

Each of the plaintiffs, except John Scott, adopted the provisions of the Superannuation Act, 1909, in pursuance of s. 3, sub-s. 1, of that Act; and all four plaintiffs duly complied with all statutory provisions required to enable them respectively to qualify for a superannuation allowance.

The Lords Commissioners of His Majesty's Treasury purporting to act in accordance with the provisions of a Treasury minute dated March 20, 1922, decided that each of the plaintiffs was entitled to superannuation and awarded to each superannuation allowances, but in calculating the annual allowance or pension to which each was entitled instead of computing it in the manner prescribed by the provisions of s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909, awarded to each: (1.) a fixed annual allowance or pension of one-eightieth of his actual annual basic or substantive salary and emoluments exclusive of his "bonus" emolument multiplied by the appropriate number of his years of pensionable service, and (2.) a further allowance described as an addition or supplement on one-eightieth of a hypothetical sum substituted for his "bonus" emolument which was less than his actual annual "bonus" emolument at the date of his retirement multiplied by the appropriate number of his years of pensionable service; and they directed that the addition or supplement so computed should be varied quarterly by reference to the official average cost of living index figure for the last preceding quarter with a limitation that the addition or supplement should not exceed an overriding maximum equal to the amount which would have been arrived at, if the addition or supplement had been calculated upon his full actual annual "bonus" emolument, and, in calculating the additional lump sum superannuation allowance to which each was entitled, instead of calculating it as a single sum upon the full aggregate amount of his actual annual salary and emoluments, including his actual annual "bonus" emolument at the date of his retirement they calculated it as: (1.) a substantive allowance computed upon his actual annual basic or substantive salary and emoluments exclusive of his "bonus" emolument, and (2.) an addition or supplement calculated upon three-fourths only of the hypothetical sum substituted for and being less than his actual annual "bonus" emolument at the date of his retirement.

Each of the plaintiffs Nixon, Clarke and Samuel claimed that he entered the service on the basis and in reliance on a Treasury minute dated June 14, 1859 (the terms of which are hereinafter stated), and that accordingly he was entitled to a superannuation allowance calculated in the manner prescribed by the provisions of s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Act of 1909, as follows: (*a*) to an annual allowance or pension as from the date of his retirement during the remainder of his life of a fixed and invariable amount equal to one-eightieth of the aggregate amount of the actual annual basic salary and emoluments and his actual annual "bonus" emolument at the end of his retirement multiplied by the number of completed years (not exceeding forty years), which he had served in an established capacity, and (*b*) to a lump sum by way of an additional allowance equal to one-thirtieth of the aggregate amount of his actual annual basic salary and emoluments and his actual annual "bonus" emolument at the time of his retirement multiplied by the number of completed years (not exceeding forty-five years), which he had served in an established or pensionable capacity, and (*c*) to an addition to the lump sum equal to one-half per cent. of such lump sum in respect of each completed year which he had served at the passing of the Superannuation Act, 1909.

The Treasury minute dated June 14, 1859, was as follows: "With regard to persons appointed or to be appointed subsequent to the passing of the Superannuation Act, 1859, my Lords observe that the language of the Act is precise and that such persons are to be held entitled to the retiring allowances prescribed by the 2nd section of the Act, provided they fulfil the conditions of the 17th section and provided my Lords do not find it necessary to exercise the power conferred upon them by the 9th section of reducing the allowance on account of the demerits of the person claiming it."

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In this action against the Attorney-General the plaintiffs claimed: (1.) a declaration that each was entitled as of right to have the amount of his superannuation allowances calculated in the manner prescribed by s. 2 of the Superannuation Act, 1859, as amended by s. 1, and s. 3, sub-s. 1, of the Act of 1909, and (2.) a declaration that the Treasury minute of March 20, 1922, in so far as it purported to put any limitation on the right of each of the plaintiffs to have the amount of his annual superannuation allowance or pension and the amount of his additional lump sum superannuation allowance calculated on the full amount of his actual annual salary and emoluments, including the full amount of the actual annual "bonus" emolument payable at the date of his retirement, and in so far as it purported to make the annual allowance or pension vary from time to time was contrary to the provisions of the Superannuation Acts and was null and void and of no effect and that the application of that minute in the awarding and computing of the superannuation allowances to each of the plaintiffs was ultra vires.

The defendant in his defence pleaded that none of the plaintiffs became or was entitled as of right to any superannuation or other allowance or to any pension or gratuity or other payment on retirement and that the action was accordingly not maintainable: referred to s. 30 of the Superannuation Act, 1834; and further pleaded that the decisions of the Treasury in respect of superannuation allowances pensions gratuities or other payments awarded or refused to the plaintiffs and each of them were final and binding on them and each of them in all respects and referred to s. 2 of the Act of 1859; s. 9 of the Act of 1887 and s. 4 of the Act of 1909.

The plaintiffs Nixon and Clarke were called and gave evidence as to being induced by reading the Treasury minute of 1859 and the Act of that date to enter the Civil Service and as to the circumstances generally attending their entry.

A. A. Dickie (*K.C. Ireland*), *J. V. Nesbitt* and *W. J. L'Amie* for the plaintiffs.

Sir William Jowitt A.-G., Sir James Melville S.-G., Giveen and *Stafford Crossman* for the defendant.

CLAUSON J. This is an action brought by four gentlemen who have retired from various branches of the Civil Service against His Majesty's Attorney-General; and they claim certain declarations as to the proper method of calculating the various benefits which are to come to them by virtue of the Superannuation Acts which deal with the matter.

The first and main point is this: The Attorney-General points out that all questions arising under the Superannuation Acts as regards the benefits to which retired civil servants are entitled are questions which by law are for the determination not of these Courts, but of other persons. This is not a new point. Precisely this point—namely, whether or not this is a matter which could be brought before these Courts for determination, was decided as long ago as the year 1880 by Malins V.-C. in the case of *Cooper* v. *The Queen.* (1) The headnote in that case is: "Under the Acts regulating the superannuation allowances of the Civil Service, the decision of the Commissioners of the Treasury as to the amount of an allowance is final, and no Court of law has jurisdiction in the matter." The matter came up again in the year 1915 in *Yorke* v. *The King* (2) before Lush J. in the King's Bench Division. The headnote in that case is: "Under the Superannuation Acts, 1834 and 1859, the decision of the Commissioners of the Treasury, either as to whether a person is entitled to a superannuation allowance or as to the basis upon which an allowance shall be calculated, is final, and no Court of law has jurisdiction in the matter. *Cooper* v. *The Queen* (1) followed." Thus two Courts of co-ordinate jurisdiction, first Malins V.-C. some forty-nine years ago and then Lush J. some fourteen years ago, have precisely decided this point in the way in which the Attorney-General asks me to decide it; and, therefore, I have no course open to me but to decide it in the same way and leave the matter to be ventilated elsewhere. I gather from the way in which this

(1) 14 Ch. D. 311. (2) [1915] 1 K. B. 852.

point was put before me that the action was launched with a thorough appreciation of this position and with the object of carrying the matter further. I think it however my duty, in fairness to those who may be tempted to carry the case further, to point out that the matter does not rest there. The point was considered in the House of Lords in *Considine* v. *McInerney* (1) thirteen years ago. Lord Buckmaster L.C. in that case, in speaking of superannuation allowances of this kind and of the expectation that any civil servant has of receiving those allowances, said: "This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings." It was pointed out, and quite truly, that although the contrary view was suggested by counsel, it was not pressed, possibly because counsel realized that at that time of day it was useless to expect the House of Lords to take any other view. However, Lord Buckmaster in the House of Lords so stated the law. But the matter does not rest even there. Incidentally, the point came up for consideration before the Privy Council in the year 1927 in *Wigg* v. *Attorney-General for the Irish Free State.* (2) In that case the judgment was that of Viscount Cave, L.C., Viscount Haldane, Viscount Dunedin and Viscount Finlay, and two of them were ex-Lord Chancellors. The judgment, which was delivered by Viscount Cave, contains this passage: "The respondent relied, in the first place, on the decisions of the English Courts, which have laid it down that a servant of the Crown has no right under the Superannuation Acts to sue for his superannuation allowance, and for this purpose reference was made to the cases of *Cooper* v. *The Queen* (3) and *Yorke* v. *The King.* (4) Their Lordships do not question the authority of those decisions"—now mark these words—"which indeed was recognized by the House of Lords in *Considine* v. *McInerney.*" (1) And then his Lordship goes on to explain that for the particular purpose in hand, it was not necessary for their Lordships to deal with that case. *Wigg* v.

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(1) [1916] 2 A. C. 162, 170.
(2) [1927] A. C. 674.
(3) 14 Ch. D. 311.
(4) [1915] 1 K. B. 852.

Attorney-General for the Irish Free State (1) was referred to in a case before the Privy Council, *In re Transferred Civil Servants (Ireland) Compensation* (2): where these words occur in the judgment which was delivered by the Marquess of Reading on behalf of himself, the late Lord Phillimore, the present Master of the Rolls, Lord Alness and Anglin C.J. (3): "Their Lordships are not unmindful of Mr. Dickie's argument that the Treasury minute could be challenged in the Courts by a servant of the Crown, but their Lordships find no justification for this contention. Sect. 30 of the Superannuation Act of 1834 is unrepealed, and is still the enactment that governs the position. The law was clearly stated in *Cooper* v. *The Queen* (4) and *Yorke* v. *The King* (5), and was recognized by the House of Lords in *Considine* v. *McInerney*." (6) It is possible that I have gone slightly beyond the boundary of my duty in referring to those cases, but this is clear, that, in this Court, the matter can only be decided in the way I have indicated. My view, so far as this point is concerned, is that the action must entirely fail, because it is now well settled that the rights, so called, of a civil servant under the Superannuation Acts are rights which are not rights of a legal character and cannot be enforced by a judgment of this Court. So much for the first point, which I think I am right in saying decides the main question in this matter.

There are, however, some subsidiary matters with which I must deal. First of all, I have to deal with a point with regard to a declaration of right which was made by learned counsel in his argument when he opened the case before me. As I understand it, the argument was this, that even if the right which the plaintiff claims is not legally enforceable, still he has the right to come to the Court and ask for judgment and, if in the course of so doing, a question of construction of a statute arises, he can ask for the decision of the Court upon that. The argument is based, as

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(1) [1927] A. C. 674.

(2) [1929] A. C. 242.

(3) Ibid. 255.

(4) 14 Ch. D. 311.

(5) [1915] 1 K. B. 852.

(6) [1916] 2 A. C. 162, 170.

I understand it, upon certain phrases used by Sir George Farwell in giving the judgment of the Privy Council in the *Eastern Trust Co.* v. *McKenzie, Mann & Co., Ld.* (1) I have studied that judgment with care, and I can find nothing in the language of Sir George Farwell to suggest the truth of the proposition in support of which, as I understand, the case was cited. It appears to me plain from the language which his Lordship uses (2) that he was pointing out that, where there is a question of right, that is, of legal right, between a subject and the Crown, then it is proper that the Government should use every endeavour to enable that question of legal right to be determined by the proper tribunal —namely, by the Courts of the country. In that particular case it was suggested that that question of legal right could not be or ought not to be determined by certain Courts of one of the Dominions, because of procedural difficulties in the presentation of a petition of right and so on, and Sir George Farwell was saying—and I think in reasonably clear terms—that no Government ought to allow some procedural difficulty to hinder a suppliant from obtaining from the properly constituted Courts of the country a decision upon his legal rights. I can find nothing in that judgment that even remotely suggests that, where there is not a legal right between the suppliant and the Crown, it would be proper that the Courts should be invited to give some sort of advice to the Crown. This Court has jurisdiction, in a proper case, to declare rights, and that jurisdiction, whether or not it exists apart from the rules of the Court, has now been dealt with by those rules, and there is an express provision in the rules enabling this Court to make a declaration of right, notwithstanding that no consequential relief is claimed. The declaration of right means in my opinion declaration of legal right, and I have no power to make any declaration, even if I desired to make one, except a declaration, as I read the rule, of a legal right. If I am right in the view which I have expressed on the first point that a retired civil servant has, under the Superannuation Acts, no rights in

(1) [1915] A. C. 750.

(2) [1915] A. C. 759 760.

the nature of legal rights as against the Crown, then the whole basis of the foundation of the jurisdiction to make such a declaration as is asked is gone, and it is impossible for me to grant the relief which is sought by way of declaration.

There is however still a third and subsidiary matter. Although the point is not very clearly raised by the pleading, I am prepared to treat it as sufficiently pleaded. It consists in the contention that in the case of the plaintiffs, at all events of some of the plaintiffs, a contract arose at the time when they respectively entered the Civil Service, between each of them respectively and the Crown, the Crown contracting through the Lords Commissioners of the Treasury, to this effect, that if the gentleman in question would enter the Civil Service he should have a legal right to receive the superannuation allowances as marked out in the Superannuation Acts, even although on the true construction of the Superannuation Acts, that right would not, but for the contract between them, have been legally enforceable. Now that case is attempted to be made out in this way. In the year 1859 the Treasury issued a minute. That minute, as I read it, indicates the lines upon which the Treasury are proposing to administer, as it was their duty to administer, the Superannuation Acts. In that minute there is this paragraph: "With regard to persons appointed or to be appointed subsequently to the passing of the Act of 22 Vict., my Lords observe that the language of the Act is precise and that such persons are to be held entitled to the retiring allowances prescribed by the second section of the Act, provided they fulfil the conditions of the seventeenth section, and provided my Lords do not find it necessary to exercise the power conferred on them by the ninth section of reducing the allowance on account of the demerits of the person claiming it." That paragraph seems to me to be reasonably clear. It draws attention to the provisions of the Act of 1859, which differ in language to some extent from the Act of 1834. It is, in fact, partly due to that difference in language that an argument was put forward, as I say, nearly half a century ago, that the Superannuation Acts then in force

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operated to create legally enforceable rights. I do not find in the minute any suggestion that their Lordships, by issuing this minute, intended to indicate that civil servants should have any other rights than those given by the Superannuation Acts, and those, as we know, are rights not legally enforceable. However, the matter does not stop there. It is contended that I am to read this minute as an offer to persons proposing to enter the Civil Service, that, if they enter that service, they are to have legally enforceable rights. I do not construe the minute to mean anything of the kind. But further than that, I do not construe the minute as being anything in the nature of an offer at all. There does not seem to be anything in the language of it to justify such a suggestion. I have had no evidence that the minute was published on the footing of an offer to an entrant into the Civil Service, to whose attention the minute is drawn, of some special terms of legal obligation to be undertaken by the Lords of the Treasury acting on behalf of the Crown. The contention is, in truth, that the minute was something of the nature of an advertisement constituting an offer to any one who was qualified to accept it, and that upon acceptance by entrance into the Civil Service, a legally enforceable contract was formed.

It appears to me that there is nothing of the kind here at all, nothing which can be said to be an advertisement or an offer by advertisement. The evidence of the two plaintiffs who gave evidence comes to this, that before entering the Civil Service their attention was drawn to a very useful little book which was in existence and has been in existence for a great many years and, as I understand, is published every year, the Civil Service Year Book. It is not, I gather, an official but a private publication, which sets out in a convenient form the Superannuation Acts, and also contains, amongst other documents, the Treasury minute. It sets it out as an official document illustrating the manner in which the law is administered, a most accurate way of stating the effect of it. These gentlemen seem to have read that book, and having studied the Superannuation Acts and havin read the minute, they seem to have been impressed with the advantages which would be obtained by going into the Civil Service; and, with that in mind, and I doubt not, many other things too, they resolved to join the Civil Service. For myself I am quite unable to appreciate how, on that state of facts, it can be suggested that the minute formed the basis of a contract with these gentlemen. I have seen them in the box, and they gave their evidence fairly, but I am quite clear that in the mind of neither of them was there any "animus contrahendi," any intention to enter or any thought of entering into a contract with the Crown under which he was to have legal rights. "Animus contrahendi" is, of course, necessary on the part of all parties to the formation of a contract. The suggestion that there might be "animus contrahendi" on the part of the Crown is one which cannot reasonably be put forward, and indeed I am not sure that it was seriously put forward; but the difficulties of making good such a suggestion are in my opinion very great. It does not appear that any suggestion to enter into such contract was ever made by any person, responsible or otherwise, in the service of the Crown; and I asked, in vain, for any statutory authority enabling the Lords Commissioners of the Treasury to enter into such a contract, even if they had been minded to enter into it; and, if there was no authority enabling them to enter into it, I cannot infer that they entered into a contract—which, so far as I can see, they had no power to enter into—through the publication of a minute which, as I construe it, has none of the indicia of an attempt to form a contract. I feel tempted to say that the suggestion that there was any such contract made between these gentlemen and the Crown, when they entered the service of the Crown, is fantastic. I cannot see the slightest evidence of any such contract and I do not believe that any such contract was in the mind of any human being at the time.

I hold, as a fact, that there was no contract; but, as I pointed out, even if I am wrong in holding that on the construction of the document and in the circumstances a contract could not be spelled out, that by no means puts an end to the difficulties, because none of the plaintiffs could enter into a contract with the Lords of the Treasury, unless their Lordships had authority from the Crown to enter into the contract, and it is difficult to see how such a contract could be effected otherwise than by virtue of the authority of a statute, and no such statute, admittedly, exists. On those grounds, it appears to me that I am bound to dismiss this action, subject to two points which will now be dealt with.

It is suggested that the provisions of some special Acts apply to two of the plaintiffs, to the terms of which my attention has not been drawn. Therefore, I will now hear what are the points as regards those two particular gentlemen and deal with them.

J. V. Nesbitt for the plaintiffs Nixon and Scott. As to Nixon, who in 1883 was transferred to the Metropolitan Police Courts Department and retired in 1922: by s. 5, sub-s. 2, of the Metropolitan Police Courts Act, 1897, the superannuation allowances payable thereafter to persons who at the passing of that Act were members of the staff were to continue payable in accordance with the provisions of the Superannuation Act, 1859, and the enactments amending the same. As regards Scott: it must have been the intention of the legislature that he should receive some legal consideration for assigning his pension, worth 408*l.*, to the Postmaster-General. The effect of s. 6, sub-s. 4, of the Telephone Transfer Act, 1911, is that, if a civil servant fulfils the conditions and the Treasury award him a pension, the amount of the pension must be calculated at the rate prescribed by sub-s. 4, and that Scott is entitled to a pension under that sub-section, notwithstanding s. 10, sub-s. 2, which provides that the Act shall be read as one with the Superannuation Acts, 1834 to 1909.

CLAUSON J. I do not find it necessary to trouble you, Mr. Solicitor. I have listened since giving the judgment which I delivered a few moments ago, to the two special points as regards two of the plaintiffs. Unfortunately, they were omitted in opening the case and they were reserved to be dealt with after deciding the main point.

As regards Mr. Nixon, the peculiarity in his case is that he came under the provisions of an Act known as the Metropolitan Police Courts Act, 1897, by reason of his having been transferred from the Home Office to the Police Courts Department. But I think it was recognized by Mr. Nesbitt that having regard to the provisions of that Act, it was plain that Mr. Nixon's position was not affected by his transference, and that he was in the same position as regards superannuation, as if he had not been transferred to the Metropolitan Police Courts Department. I say no more about his case.

With regard to Mr. Scott, his position is different. He was originally in the service of the National Telephone Company. The undertaking of that company was taken over by the State and he was transferred to the service of the Postmaster-General under the Telephone Transfer Act, 1911. Under that Act the Post Office took over certain employees of the Telephone Company, and it was recognized that some of those employees might have or would have certain legal rights as against the Telephone Company in respect of certain superannuation funds which had been built up. Provisions are made in the Acts on these lines, that the Superannuation Acts are to apply, as of course they necessarily would apply, to these transferred gentlemen on their becoming and by virtue of their becoming servants of the Post Office, but that certain modifications were needed to deal with those particular cases. One modification was this, that a man who was prepared to give up his rights against the company's superannuation fund, was to have the benefits which were to come to him under the Superannuation Acts calculated in a somewhat different manner from the manner in which they would be calculated with regard to any ordinary civil servant. I need not go through the details of it. That, amongst other things, is effected by the sections of the Act which appear under "Part II. Rights of Company's Officers to Superannuation Allowances."

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On reading those sections and also the section to which my attention was called in the general part of the Act which declares that the Act, so far as it relates to employees is to be read as one with the Superannuation Acts, it appears to me quite clear, as a matter of construction, that a man in Mr. Nixon's position who is willing to give up his legal rights—I assume that he had legal rights against the Telephone Company—is to get these extra benefits, if I may so call them, under the Superannuation Acts in precisely the same way as any other civil servant gets his benefits under these Acts. Any other civil servant gets those benefits—as I have already held—to quote the words of Lord Buckmaster in the case of *Considine* v. *McInerney* (1), not by virtue of a legal right, but under "an expectation which may be relied upon with full certainty" that he will get a certain superannuation allowance. Accordingly, it seems to me that the peculiar circumstances of Mr. Scott do not differentiate his case from that of the other plaintiffs. Having become a civil servant he has, with the modifications indicated in the Act, come into precisely the same position as any other civil servant as regards superannuation allowance; in other words, he has no legal right but the expectation which Lord Buckmaster mentions. Accordingly, these points which were reserved in no way affect the decision I have already given, and in these circumstances, as regards all the plaintiffs, the action will be dismissed.

Sir James Melville S.-G. I think as regards the costs, this is the class of action in which the Crown neither receives nor pays costs. I hope that it may not go forth that your Lordship appears to have decided or that the Attorney-General conceded that this action is properly constituted as against the Attorney-General as defendant. The claim is a money claim and could and should properly be brought by way of a petition of right. In that case, according to your Lordship's judgment, the petition would have rightly been dismissed with costs. In addition, it would have been open to the

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(1) [1916] 2 A. C. 170.

Attorney-General or to the Crown in that case to demur to the action. I venture to think that in that case the demurrer would have been upheld with costs. It was felt in this case, that, as it concerned a large number of persons—it is in the nature of a test case, and involves several millions of pounds—the better course was to have the matter disposed of before your Lordship on the merits of the case and not have the claim hanging over indefinitely. I hope therefore that it will not be supposed that, so far as the Crown is concerned, we have conceded that this is a proper form of action or that it may be used against us owing to the manner in which the Attorney-General decided to deal with it.

CLAUSON J. Then the action will be dismissed without any order as to costs.

H. C. H.

C. A.

The plaintiffs appealed. The appeal was heard on January 16, 17, 20, 1930.

Schiller K.C. and *J. V. Nesbitt* for the appellants. Superannuation allowances are paid under the Superannuation Acts, 1834 to 1909, which confer on civil servants the right to allowances of definite amounts. It might be that the civil servant could not claim as of right to be awarded a superannuation allowance, but when once an allowance has been awarded, its amount is determined by statute and he is entitled to an allowance of that amount as a matter of right. It is necessary to review the historical position of civil servants as regards pensions. Originally they had no right to any pension whatever, but in quite early days, even in Stuart times, one branch of the Civil Service—namely, the officers of excise—created a pension fund of its own. In 1809 the Act of 49 Geo. 3, c. 96, was passed confined to that department. In subsequent Acts of 50 Geo. 3, c. 117, and 3 Geo. 4, c. 113, a scheme of contributory pensions was arranged for the whole service. But by 5 Geo. 4, c. 114, the contributions were done away with. In 1834 a consolidating Act (4 & 5 Will. 4, c. 24) was passed and by s. 8 the previous Acts were repealed. Sects 9 and 10 fixed the amounts which pensions were not to exceed. In s. 13 provision was made for the payment of allowances to the "persons entitled to receive the same" without deduction. The word "entitled" suggests that the pension was a matter of right, and s. 27 authorized abatements from salaries towards providing the superannuation allowances. This section was repealed by the Act of 1857 (20 & 21 Vict. c. 37). It is true that s. 30 of the Act of 1834 provides that nothing in the Act shall be construed "to extend to give any person an absolute right to . . . . any superannuation or retiring allowance under this Act." But it is difficult to understand why the expression "absolute right" was used unless some right is intended to be conferred.

[Lord Hanworth M.R. Except for the word "entitled" there is nothing to suggest a right.]

It is a little curious that all these Acts should be passed if it was merely to be a matter of the good will of the Commissioners whether an allowance should be granted. Sect. 11 of the Act shows that allowances were conditional on attaining a certain age unless retirement was due to age and infirmity. This sufficiently explains the provision in s. 30.

The next Act to be referred to is the Superannuation Act, 1859 (22 Vict. c. 26), but it is to be noted that s. 30 of the Act of 1834 was never repealed. Sect. 2 fixes the scale of pensions and provides what they shall be and does not, as in the earlier Act, fix a maximum. There is, however, a proviso which is relied on for the Crown. It is in these terms: "Provided always, that if any question should arise in any Department of the Public Service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final." That proviso is, however, limited in effect and only gives the Treasury the right to decide whether a pension is to be paid and not to fix its amount when one has been awarded. If awarded it must be of the amount fixed by the earlier part of s. 2. Later sections supported this view. The language of s. 2 may be contrasted with s. 5, which says that it shall be lawful to the Commissioners

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of the Treasury to grant a gratuity or superannuation allowance to a person not having completed the period "which would have entitled him to a superannuation allowance": see also ss. 6 and 7. Sect. 12 provides for the transfer of officers holding employments "entitling them to superannuation allowances" "without forfeiting their claims to such allowances": see also s. 17, where the word "entitled" is again used. The whole language of this Act is consonant only with a legal right being conferred to a superannuation allowance according to scale. The same observation applied to the Superannuation Act, 1887 (50 & 51 Vict. c. 67). Lastly came the Superannuation Act, 1909 (9 Edw. 7, c. 10), which altered for the future the scale of pensions. In this Act the language of sub-ss. 1 and 2 of s. 1 must be contrasted. Sect. 1, sub-s. 1, alters the scale fixed in s. 2 of the Act of 1859 in language which makes a pension calculated on this scale a right. Sub-s. 2 provides that the Treasury "may" in certain cases grant a lump sum in addition to the superannuation allowance to which "he may become entitled": compare also the language of ss. 2 and 3 and 4.

This survey of the Superannuation Acts is sufficient to show that a person awarded a superannuation allowance has a right to a pension of a fixed amount to be determined by s. 2 of the Act of 1859 as amended by s. 1 of the Act of 1909. But even if this is not so, the plaintiffs Nixon and Clarke have by their evidence established that they entered the Civil Service on the faith of the Treasury minute of June 14, 1859, of which they had seen a copy in the Civil Service Year Book. That minute amounted to an offer which these plaintiffs accepted by entering the Civil Service on the faith of it. They have therefore a contractual right to superannuation allowances on the scale stated in that minute, which they can enforce in a Court of law. This Treasury minute was published and must have been intended to be read by all whom it might concern as stating the terms in regard to superannuation allowances on which they could enter the Civil Service.

[LAWRENCE L.J. This minute may have been issued for some quite other purposes.]

There is no evidence as to the purposes except such as appears from the passage in question and the fact that it was published.

[LORD HANWORTH M.R. With whom do you suggest the contract was made ?]

With the King through his Secretary of State.

Lastly, the plaintiff Scott occupies a special position as a result of s. 6 of the Telephone Transfer Act, 1911. This section secures to all old servants of the National Telephone Company appointed to a pensionable office of the Civil Service a superannuation allowance as of right. It must be remembered that this plaintiff assigned to the Postmaster-General his share of the Telephone Company's pension fund to which he had contributed.

It remains to consider the authorities relating to the appellants' main contention that a civil servant has under the Superannuation Acts, 1834 to 1909, a legal right to a pension of a fixed amount when once a pension has been awarded. No such right was recognized by Malins V.-C. in *Cooper* v. *The Queen* (1) or by Lush J. in *Yorke* v. *The King* (2), but these are decisions of Courts of first instance. Further, they are distinguishable as being demurrers on petitions of right.

[LORD HANWORTH M.R. In *In re Tufnell* (3) ; and *Dunn* v. *The Queen* (4) the Court has decided that servants of the Crown hold office during the pleasure of the Crown only. It is difficult therefore to see how the Court can control the Crown in a question of pensions.]

In *In re Lupton* (5) Cozens-Hardy M.R. and Fletcher Moulton L.J. pointed out that s. 1, sub-s. 1, of the Superannuation Act, 1909, confers allowances of a fixed amount on civil servants as of right : see also what was said by Phillimore J. in the same case (6), expressing the opinion in

(1) 14 Ch. D. 311.
(2) [1915] 1 K. B. 852.
(3) (1876) 3 Ch. D. 164.
(4) [1896] 1 Q. B. 116.
(5) [1912] 1 K. B. 107, 114, 115.
(6) Ibid. 109.

regard to the lump sum payable in s. 1, sub-s. 2, that the gift is optionable, but if made must be of a certain amount. If that is so under s. 1, sub-s. 2, it is even more clearly so under s. 2 of the Act of 1859 as amended by s. 1, sub-s. 1, of the Act of 1909. No doubt the grant of a superannuation allowance was originally an exercise of the Royal Prerogative, but when the authority to exercise the Royal Prerogative is embodied in statutes, regard must be paid to the statutes exclusively: *Attorney-General* v. *De Keyser's Royal Hotel, Ld.* (1) Reliance will be placed by the Crown on *Considine* v. *McInerney* (2), where Lord Buckmaster referred with approval to *Cooper* v. *The Queen* (3); and *Yorke* v. *The King* (4), but his remarks on this subject are only dictum. So too in *Wigg* v. *Attorney-General for the Irish Free State* (5) the Privy Council were deciding a question under the Government of Ireland Act, 1920, as to the rights of civil servants and distinguished *Cooper* v. *The Queen* (3); and *Yorke* v. *The King.* (4) The same is true in *In re Transferred Civil Servants (Ireland) Compensation.* (6) It would be a remarkable thing if this progressive building up of a statutory system in regard to superannuation allowances had still left the civil servant without any legal right and the recipient of allowances ex gratia at the will of the Treasury. It is submitted that this is not the true view.

Sir James Melville S.-G., Giveen and *Stafford Crossman* (*Sir William Jowitt A.-G.* with them) for the respondent. The main question in this case is really concluded by authority: *Cooper* v. *The Queen* (3) is directly in point and was followed in *Yorke* v. *The King.* (4) No doubt the appellants were entitled to rely on the observations of Phillimore J. and Fletcher Moulton L.J. in *In re Lupton* (7), but they were only dicta, as the question in that case was whether a lump sum awarded by way of additional allowance under s. 1, sub-s. 2, of the Superannuation Act, 1909, was "compensation granted by the

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(1) [1920] A. C. 508.
(2) [1916] A. C. 162.
(3) 14 Ch. D. 311.
(4) [1915] 1 K. B. 852.
(5) [1927] A. C. 674, 678.
(6) [1929] A. C. 242, 255.
(7) [1912] 1 K. B. 107, 109, 115.

Treasury" within the meaning of s. 53 of the Bankruptcy Act, 1883. Further, the relevant authorities were never cited to them. In *Considine* v. *McInerney* (1), *Cooper* v. *The Queen* (2) and *Yorke* v. *The King* (3) were expressly approved and in dealing with the question now in issue Lord Buckmaster and Lord Loreburn made their conclusions in regard to it the basis of their judgments. The same cases were referred to with approval in *Wigg* v. *Attorney-General for the Irish Free State* (4); and *In re Transferred Civil Servants* (*Ireland*) *Compensation*. (5) In view of these authorities it becomes almost unnecessary to discuss the provisions of the Superannuation Acts, 1834 to 1909, at length. Sect. 10 of the Act of 1834 fixed limits of the superannuation allowances that could be granted, and s. 2 of the 1859 Act does no more than substitute a different scale. Sect. 30 of the Act of 1834 recognizes the absolute position of the Crown and the proviso to s. 2 of the Act of 1859 makes it clear that that section was to confer no right. The object of the statutes was not to confer rights on civil servants but to give statutory authority for the application of the Consolidated Funds in payment of superannuation allowances within certain limits: compare ss. 9 and 10 of the Act of 1859. Further, s. 18 provides for the 1859 Act and the unrepealed part of the 1834 Act being construed together as one Act. Therefore s. 30 applies equally to the 1859 Act. There is a similar provision in s. 8 of the 1909 Act, and see also s. 4 of this Act.

It follows that the true interpretation of the Acts is that no legal right is conferred on any civil servant in regard to the receipt of a superannuation allowance or its amount when one has been awarded.

As regards the claim that the plaintiffs Nixon and Clarke had entered into a contract as the result of their joining the service on the faith of the minute of 1859, Clauson J. found that there was no animus contrahendi. Further, there is no evidence that the 1859 Act was published by way of offer.

[They were stopped on this point.]

(1) [1916] 2 A. C. 162.
(2) 14 Ch. D. 311.
(3) [1915] 1 K. B. 852.
(4) [1927] A. C. 674, 678.
(5) [1929] A. C. 242, 255.

Lastly, the effect of the Telephone Transfer Act, 1911, was simply to place an employee of the National Telephone Company who received a pensionable office into the position of any other civil servant under the Superannuation Acts.

Schiller K.C. replied.

Cur. adv. vult.

Feb. 19. LORD HANWORTH M.R. This is an appeal from an order of Clauson J., who on November 6, 1929, dismissed the action.

It was commenced by writ dated July 11, 1928, by the four plaintiffs who claimed four declarations. The first, that each of the plaintiffs is entitled as of right to have the amount of his superannuation allowances calculated in the manner prescribed by s. 2 of the Superannuation Act, 1859, as amended by s. 1, and s. 3, sub-s. 1, of the Superannuation Act, 1909. The second, that a minute of the Treasury, dated March 20, 1922, as to certain matters contained in it is null and void, and if applied in awarding and computing the superannuation allowances of either of the plaintiffs, ultra vires; and the third and fourth relate to the quantum of the allowances to be awarded to each of the plaintiffs.

The plaintiffs' claim depends upon the proper construction and application of several Acts of Parliament, the relevant parts of which are set out in the statement of claim.

In his defence the Attorney-General takes the objection that the action is not maintainable, or if maintainable is not maintainable against His Majesty's Attorney-General. The Attorney-General while reserving his right to object to the procedure adopted by the plaintiffs, does not raise any technical point based upon it in this Court. His two defences are that the decision of the Commissioners of the Treasury, both as to whether a person is entitled to a superannuation allowance, and as to the basis upon which it shall be calculated, is final and conclusive, and that no Court of law has jurisdiction in these matters, which depend upon the grace and bounty of the Crown exercised by the Lords Commissioners of the Treasury.

The facts which raise these issues of law are not quite the same in the case of all the four plaintiffs and must be shortly stated.

The plaintiff Nixon entered the permanent Civil Service as a clerk in the Home Office in May, 1877, in an established capacity, with a certificate from the Civil Service Commissioners, and was employed in various capacities in the Civil Service, or in service to which the Superannuation Acts apply, until February 27, 1922.

William Clark was employed likewise in the Civil Service from February, 1882, down to February 28, 1922.

Benjamin Louis Samuel entered the Permanent Civil Service as telegraphist in March, 1880, in an established capacity, and was employed from that date down to June 30, 1925.

The plaintiff John Scott entered the service of the National Telephone Company, Ld., in November, 1895, and was a contributor to the company's pension fund in February, 1896, and continued in such employment and to be a contributor until January 1, 1912, when he was appointed to a pensionable office as defined by the Telephone Transfer Act, 1911, and by reason of the terms of that Act and of the transfer, Scott was thereafter employed in the permanent Civil Service in an established capacity, and upon terms similar to the other plaintiffs, and so continued until October 31, 1927.

The remuneration of all the plaintiffs was paid out of moneys voted by Parliament.

The plaintiffs, Nixon, Clark and Samuel, further alleged that they each of them entered the Civil Service upon the basis of, and relying upon the Treasury minute, dated June 14, 1859, so that a contract was made with them on the terms contained in that minute, which specified certain regulations as to retiring allowances and pensions, and that no alteration or deviation from those terms can be made as against their rights acquired on this basis.

A book, called the Civil Service Year Book, was produced to us which was similar to the one in which the Treasury minute relied upon was contained, and which was seen by them when they entered the Civil Service. We have seen the original draft of the minute and the original minute as circulated to the departments, and we are satisfied that it cannot be held to be, or relied upon, as the basis of any contract between the Lords Commissioners of the Treasury and the plaintiffs or either of them. It was declaratory of the intentions of the Lords Commissioners subsequent to a report of a committee appointed to consider the terms of the Superannuation Act of 1859, and was in no sense an invitation to persons to come into the Civil Service on the basis of its terms. It was clearly issued as containing information to the existing members of the Civil Service, and to some extent in reference to persons to be appointed thereafter; but, although it may have found its way into the Civil Service Year Book, there was no evidence that that book was published by the authority of the Lords Commissioners of the Treasury, or that the minute was issued as the basis of any contract made or to be made with civil servants. Its provisions reveal the adherence of the Lords Commissioners to the terms of, and their powers under, the Statute of 1859, which will be further considered.

Some evidence was given before Clauson J. by these three plaintiffs in relation to the minute, which we have carefully considered in this Court. Clauson J. has summarized its effect, and made comments upon it which appear to me to be well founded; and I will only add that I agree with the view that he has expressed upon the document, and as to the claim of these plaintiffs based upon it.

I am, therefore, of opinion that this minute cannot be used for the purposes claimed by these three plaintiffs, and that their claim, if any, must be determined upon consideration of the Acts of Parliament governing the matter.

With regard to the plaintiff Scott, no distinction arises in his case by reason of his having been originally employed by the National Telephone Company, Ld., and transferred to the Civil Service in 1911, when the Post Office acquired the telephone service under the Telephone Transfer Act, 1911.

Clauson J. has dealt with the procedure followed when the transfer took place, and it is unnecessary to repeat or add to his statement. Suffice it to say that for the reasons given by Clauson J. I am of opinion that Scott's case falls to be determined upon the same principles and considerations as the other three cases.

The qualifications of each of the plaintiffs to be awarded and paid superannuation allowances are admitted and may be stated as follows: That each of the three plaintiffs other than Scott duly adopted the provisions of the Superannuation Act, 1909, in pursuance of s. 3, sub-s. 1, of that Act with the consent of the Treasury. That each of the four plaintiffs had been in the class from which he retired for a period of more than three years immediately before the date of his retirement. That each of the four plaintiffs obtained the certificate prescribed by s. 8 of the Superannuation Act, 1859, and otherwise duly complied with all statutory provisions required to enable them to qualify for a superannuation allowance.

The Lords Commissioners of the Treasury have awarded to each of the plaintiffs: (1.) a fixed annual allowance or pension of one-eightieth of his actual basic or substantive salary and emoluments (exclusive of his "bonus" salary or emolument) multiplied by the appropriate number of his years of pensionable service; (2.) a further annual allowance equal to one-eightieth of a hypothetical sum, less than his "bonus" salary, or emolument, multiplied by the appropriate number of his years of pensionable service, and have directed that such further annual allowance shall be varied quarterly by reference to the official average cost of living index figure for the last preceding quarter and shall not exceed an overriding maximum equal to the amount which would have been arrived at if the said further allowance had been calculated on his full actual "bonus" salary or emolument. That is to say, they have awarded to them superannuation allowances calculated in accordance with the terms specified in the Treasury minute of March 20, 1922.

The question, therefore, to be determined is: Do permanent civil servants, employed as the plaintiffs were, in an established capacity, acquire a right—that is a legal right enforceable in a Court of law under the statutes applicable to them and their service—to have their superannuation allowances paid to them at the amount, and upon the basis laid down in the Superannuation Acts ?

Our attention was called by Mr. Schiller to certain statutes passed in the earlier part of the nineteenth century. By the Act passed in 1810 (50 Geo. 3, c. 117) it was provided that the amount of increase and diminution of public salaries, pensions and allowances should be annually laid before Parliament, and the circumstances and mode for payment of the same is regulated. It may be observed that in this Act, s. 2, it is provided that the payments are not to be made without the concurrence of three or more Commissioners of the Treasury, except such as may be granted by any Order of His Majesty in Council. In 1822 an Act was passed (3 Geo. 4, c. 113) regulating and controlling the granting and paying of salaries, pensions and superannuation allowances on the basis of a scheme which was in part contributory by the civil servant, and this Act again, by s. 3, provided that no superannuation allowances should be granted otherwise than under "the authority of an Order of His Majesty in Council, or by the Commissioners of His Majesty's Treasury . . . . or any three or more of them." By an Act of 1824 (5 Geo. 4, c. 104) the contributory scheme was abolished and the contributions already made were to be returned to the contributors.

I refer to these Acts only to show that I have not overlooked them, though as they were repealed by s. 8 of the Act of 1834, they are not effective to any present purpose. It may be observed, however, that they all appear to be based upon, and to illustrate the complete control of the Treasury as to the amounts to be paid, unless the sums were determined under an Order in Council—that is to say, by the Prerogative—and to lay down the provisions under which superannuation allowances are "authorised to be granted": see 3 Geo. 4, c. 113, s. 1. In other words, their purpose was to regulate the actions of the Lords Commissioners of the Treasury, and to give them power to make the payments and so to justify themselves before the Auditor-General. In no way do they confer any rights upon the civil servants who are to be the recipients of the pensions or allowances paid under them.

The Act of 1834 (4 & 5 Will. 4, c. 24) is the first of the Superannuation Acts which, with the later Acts passed, are to be read together and are given a citation of the "Superannuation Acts, 1834 to 1909." Its title is, "An Act to alter, amend, and consolidate the laws for regulating the pensions, compensations, and allowances to be made to persons in respect of their having held civil offices in His Majesty's Service." Its terms define the persons to whom pensions may be given and lay down the regulations applicable to them, and the calculations by which the quantum authorized is to be ascertained. In two sections, 13 and 27, the phrases occur, "persons entitled to receive" pensions, or superannuation, and "entitled to superannuation allowance under this Act," and an attempt is made to deduce from them that a legal right is conferred, or at least contemplated. The Act appears to me to be an Act to regulate the administration of the pensions and superannuation allowances by those in whose hands that duty is placed, and in no part is there any conferment upon the recipients of a title to claim or receive them. To put the question beyond doubt, s. 30 is in these terms: "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Commissioners of His Majesty's Treasury, and the heads or principal officers of the respective departments, of their power and authority to dismiss any person from the public service without compensation." Words could not be more explicit. An attempt was made to suggest that the use of the word "absolute" left it possible that a conditional right remained to the civil servants, but I cannot accept that view. In my judgment the word is used so that a right in any form may be negatived. The section destroys the possibility of a claim of legal right.

In 1859 a further Act "to amend the laws concerning superannuations and other allowances to persons having held Civil Offices in the Public Service" was passed (22 Vict. c. 26), and this Act and that of 1834 are to be construed together as one Act. The purpose of the later Act appears to be identical with that of 1834 as to powers given and limits imposed on those who are to administer it.

In the preamble the words "civil servants entitled to superannuation allowance" are found in reference to an Act of 1857, and in ss. 12 and 17 the word "entitled" is to be found, in the former section preceded by "without forfeiting their claims." It is contended that you cannot forfeit what does not belong to you, and that the word "entitled" connotes a right. It is unnecessary to repeat what I have already said on this point in referring to the previous Act, or to restate the purpose for which this Act, like its predecessor, was passed. But following out s. 30 of the Act of 1834, there is a proviso to s. 2 which negatives the conferment of any right enforceable in a Law Court on a civil servant. "Provided always, that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final." Sect. 9 must also be noticed, for it empowers the Commissioners of the Treasury to grant allowances for special services and to give increases within limits, and also to grant less amounts than otherwise would have been awarded to a civil servant "where his defaults or demerits . . . . appear . . . . to justify such diminution." This discretion is also deposited in the Commissioners of the Treasury alone. One further point was taken upon this Act of 1859, with which it is necessary to deal. The marginal notes of s. 3 refer to "existing rights" and of s. 12 to "right." It was contended that these catchwords could be used to explain the meaning of sections against which they appear. For my part I cannot allow this. As explained by Baggallay L.J. in *Attorney-General* v. *Great Eastern Ry.* (1) marginal notes

(1) (1879) 11 Ch. D. 449, 461.

are not a part of an Act of Parliament. The Houses of Parliament have nothing to do with them, and I agree with the learned Lords Justices in that case—Bramwell, James and Baggallay—that the Courts cannot look at them. Their imperfections, spoken of by Bramwell L.J., are illustrated by the note to s. 9 of this Act.

The next Act is that of 1887 (50 & 51 Vict. c. 67), which again amends the Superannuation Acts and upon which similar arguments are based. It contains one section which must be referred to, for it contradicts the plaintiffs' claim. By s. 9 it says: "The decision of the Treasury on any question which arises as to the application of any section of this Act to any person, or as to the amount of any allowance or gratuity under this Act, or as to the reckoning of any service for such allowance or gratuity, shall be final."

The last Act referred to is that of 1909 (9 Edw. 7, c. 10), and that completes the series of Superannuation Acts, 1834–1909, which are to be read together. It amends the scale and method of calculating allowances, and the word "entitled" is to be found in s. 1, sub-s. 2, and s. 2, sub-s. 2, and the word "right" in s. 3, sub-s. 2. In the latter the curious phrase appears: "right to . . . . gratuity." But by s. 4, the provisions of the successive Superannuation Acts from 1834 onwards "with respect to the qualifications for obtaining superannuation allowances and gratuities, and to the manner of reckoning years of service and amount of annual salary and emoluments, and to the diminution of superannuation allowances, and to the determination of questions by the Treasury, shall apply in respect of additional allowances and gratuities under this Act in like manner as they apply in respect of superannuation allowances under those Acts."

I have gone carefully through the relevant Acts of Parliament, because the appellants base their claim upon them.

If, and so far as they are granted any sums under the prerogative of the Crown, they admit that no legal right can arise. They claim that what was in the past a matter of the prerogative, has now been formulated in a succession of Acts of Parliament, with the consequence that they are entitled to rely upon statutory rights accruing to them.

After considering these Acts successively, and in detail, I can find no such right established; but I find on the contrary that by s. 30 of the Act of 1834, any right is negatived, and that provision is made in the later Acts for the final determination of all questions, both as to who is entitled, and how far any servant is entitled, by the Treasury, to the exclusion of any right to bring any of these questions before a Court of law.

I now turn to consider the authorities upon the point. It is claimed that in this Court they can be reviewed, but I doubt it.

It has been held in a number of cases that servants of the Crown, civil as well as military (see *In re Tufnell* (1)), except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. Brett M.R. said in *De Dohse* v. *The Queen* (2) that all service under the Crown is public service, and he was of opinion that the doctrine above stated applied to all public service under the Crown, because all such service is for the public benefit: see *Dunn* v. *The Queen* (3), where Lord Herschell said (4): "I take it that persons employed as the petitioner was"—in civil employment—"in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown"; and Lord Esher claimed that his words in *De Dohse* v. *The Queen* (2) had received the approval of Lord Watson, when that case came before the House of Lords, for that learned Lord said (5) that if a contract had been made between a civilian and the Crown it "must have been held to have imported into it the condition that the Crown has the power to dismiss," and that, "if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown."

(1) 3 Ch. D. 164.

(2) (1885–6) 66 L. J. (Q. B.) 422.

(3) [1896] 1 Q. B. 116.

(4) Ibid. 119.

(5) 66 L. J. (Q. B.) 423.

The same doctrine was affirmed and the above case approved in the Privy Council in *Gould* v. *Stuart* (1), in which it was decided that the Crown had power to dismiss at pleasure, except where a statute provided otherwise.

There is also authority that the Superannuation Acts do not provide such an exception: see *Cooper* v. *The Queen* (2), where Malins V.-C. decided that under the above statutes of 1834 to 1859, the decision of the Commissioners of the Treasury as to the amount of an allowance, is final, and that no Court of law has jurisdiction in the matter. In *Yorke* v. *The King* (3) Lush J. followed *Cooper* v. *The Queen* (2) and again decided that where the Commissioners of the Treasury have come to a decision whether a person is entitled to a superannuation allowance, or, if he is, as to the basis upon which it is to be calculated, that decision is final and no Court of law has jurisdiction in the matter. He held that the suppliant had no legal right. Mr. Schiller candidly admitted that this case decided the point now in question against his contention; but he argued that the case is not binding upon this Court and ought not to be followed.

In my judgment both the case of *Cooper* v. *The Queen* (2) and *Yorke* v. *The King* (3) have been supported in the House of Lords. In *Considine* v. *McInerney* (4) the question was whether a workman, injured by an accident in the course of his employment, had received superannuation allowance and gratuity under the Superannuation Acts, 1834 to 1909, as of right, or as a voluntary payment from his employers, the Civil Service Commissioners, so that it should be taken into account under the Workmen's Compensation Act, 1906. Lord Buckmaster and Lord Loreburn both decided that the money had not been paid to the workman as of legal right, and that he could not have enforced a claim for it by legal proceedings. Again in *Wigg* v. *Attorney-General for the Irish Free State* (5) Lord Cave L.C. in his judgment referred by name to the cases of *Cooper* v. *The Queen* (2) and *Yorke* v. *The*

(1) [1896] A. C. 575.
(2) 14 Ch. D. 311.
(3) [1915] 1 K. B. 852.
(4) [1916] 2 A. C. 162.
(5) [1927] A. C. 674, 678.

King (1) and said: "Their Lordships do not question the authority of those decisions, which, indeed was recognised by the House of Lords in *Considine* v. *McInerney*." (2) The same view was expressed in the judgment in *In re Transferred Civil Servants* (*Ireland*) *Compensation*. (3) The observations made in the last two cases are not authorities directly binding upon this Court, for they may be treated as obiter dicta: but they express approval of the two authorities and say that the effect of the decision of the House of Lords in *Considine* v. *McInerney* (2) was to approve them. Even if I was minded to differ from the decisions of Malins V.-C. and Lush J., which I am not, I could not venture to do so in view of the high approval which they have received.

The claim of the plaintiffs to have the Minute of March 20, 1922, set aside as published ultra vires, fails altogether when it has been decided that questions as to the persons to receive and the amount they are to receive under the Superannuation Acts, falls entirely within the powers and discretion of the Treasury and that a Court of law has no jurisdiction in the matter.

With regard to *Lupton's* case (4) I agree with the observations made in his judgment by Lawrence L.J., which I have had the advantage of reading, and I only desire to emphasize the fact that *Cooper's* case (5) was not cited to the Court and that the point here raised for decision was not the one upon which the judgment in that case turned.

For these reasons I agree with Clauson J., and the appeal must be dismissed.

LAWRENCE L.J. The Attorney-General having waived all objections to the form of procedure, the first and main question to be determined on this appeal is whether the Superannuation Acts, 1834 to 1909, confer on retired civil servants any legal rights, enforceable in the Courts of this country, in respect of the superannuation allowances thereby authorized to be granted by the Treasury.

(1) [1915] 1 K. B. 852.
(2) [1916] 2 A. C. 162.
(3) [1929] A. C. 242, 255.
(4) [1912] 1 K. B. 107.
(5) 14 Ch. D. 311.

All the four plaintiffs, who are retired civil servants, have qualified for superannuation allowances in accordance with the statutory requirements, and the Treasury has awarded to each of them a superannuation allowance of an amount calculated in accordance with the method laid down in the Treasury Minute of March 20, 1922.

The plaintiffs are dissatisfied with the amount of the allowances so awarded which they allege is less than the amount to which they are entitled under the statutes, and in this action they claim a declaration that they are entitled as of right to superannuation allowances calculated in the manner prescribed by s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909. They contend that the Treasury acted ultra vires in purporting to lay down a method of calculation differing from the scale prescribed by those sections and consequently that the Treasury Minute of March 20, 1922, was null and void.

In my judgment Clauson J. rightly decided that such a claim could not be entertained by the Court.

In considering the position of the plaintiffs under the Superannuation Acts it has to be borne in mind that civil servants hold office only during the pleasure of the Crown, except where it is otherwise provided by statute (*Dunn* v. *The Queen* (1)), that their salaries and superannuation allowances are paid out of monies voted by Parliament, and that Parliament whilst usually leaving the amount of the salaries (except in the case of higher officials) to be fixed by the Treasury has, when conferring power on the Treasury to grant superannuation allowances and gratuities to retired civil servants, invariably placed a limit on the amount which may be so granted.

Mr. Schiller contended that the prerogative of the Crown had been limited by the Superannuation Acts to the extent of laying down a scale according to which the amount must be calculated in every case in which the Treasury decides to award a superannuation allowance. In other words that, although the Treasury may have a discretion as to whether

(1) [1896] 1 Q. B. 116.

any superannuation allowance at all should be awarded, it has no discretion as to the amount of such allowance and that consequently (as the Treasury has exercised its discretion in awarding a superannuation allowance to each plaintiff) the plaintiffs are entitled as of right to allowances calculated in accordance with the scale prescribed by s. 2 of the 1859 Act as amended by s. 1 and s. 3, sub-s. 1, of the 1909 Act.

Practically the same argument was addressed to the Court in *Cooper* v. *The Queen* (1) and in *Yorke* v. *The King.* (2) In *Cooper's* case (1) Malins V.-C. held that the right to superannuation allowances under the 1834 and 1859 Acts was a peculiar right which could never be enforced in the civil tribunals of this country and that a retired civil servant "must therefore depend upon the bounty of the Crown whether he is to have the whole amount or any part which the Commissioners may think fit, or what they will take into consideration, or what they will not." In *Yorke's* case (2) Lush J., following the decision in *Cooper's* case (1), held that the suppliant, who was a retired civil servant, had "no legal right to ask the Court to decide either that he is entitled to a pension, or as to the basis upon which it should be calculated."

In *Considine* v. *McInerney* (3) the position of a retired civil servant under the Superannuation Acts, 1834 to 1909, was considered in the House of Lords. Lord Buckmaster L.C., after reviewing the relevant provisions of the Acts and pointing out that the 1909 Act had not altered the fundamental provisions of the earlier Acts but had merely changed the rate of allowance, stated (4) that the position of a civil servant under the statutes might be summarized as follows: "He was entitled to expect an annual allowance at the rate of one-eightieth for every year of service which he had served, and a lump sum down, but such allowance would not begin before the age of sixty unless upon medical certificate that he was by reason of bodily infirmity permanently unable to continue his work. This expectation, though it might be relied on with full certainty, was none the less not a legal right, and

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(1) 14 Ch. D. 311.
(2) [1915] 1 K. B. 852.
(3) [1916] 2 A. C. 162.
(4) Ibid. 170.

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no claim for it could be enforced by any legal proceedings." In the same case Earl Loreburn stated (1) that the respondent (a retired civil servant) "had no legal right to claim it," i.e. the pension, "but he had an expectation practically amounting to a certainty of obtaining it at the age of sixty, and even before sixty, if he should get a medical certificate that he was incapable from infirmity of mind or body."

In *Wigg* v. *Attorney-General for the Irish Free State* (2) Viscount Cave L.C., in delivering the judgment of the Board, said: "Upon the first question the respondent relied in the first place on the decisions of the English Courts which have laid it down that a servant of the Crown has no right under the Superannuation Acts to sue for his superannuation allowance; and for this purpose reference was made to the cases of *Cooper* v. *The Queen* (3) and *Yorke* v. *The King*. (4) Their Lordships do not question the authority of those decisions, which, indeed, was recognised by the House of Lords in *Considine* v. *McInerney* (5); but those cases turned entirely upon the language of the Superannuation Acts."

In *In re Transferred Civil Servants* (*Ireland*) *Compensation* (6) Mr. Dickie (one of the counsel appearing on the reference) contended (inter alia) that the Treasury Minute of March 20, 1922, could be challenged in the Courts by a retired civil servant. In reference to this contention the Marquess of Reading in delivering the judgment of the Board said (7): "Their Lordships are not unmindful of Mr. Dickie's argument that the Treasury Minute could be challenged in the Courts by a servant of the Crown, but their Lordships find no justification for this contention. Sect. 30 of the Superannuation Act of 1834 is unrepealed, and is still the enactment that governs the position. The law was clearly stated in *Cooper* v. *The Queen* (3) and *Yorke* v. *The King* (4) and was recognised by the House of Lords in *Considine* v. *McInerney*. (5) In *Wigg's* case (8) the previous Board approved these decisions,

(1) [1916] 2 A. C. 171.
(2) [1927] A. C. 674, 678.
(3) 14 Ch. D. 311.
(4) [1915] 1 K. B. 852.
(5) [1916] 2 A. C. 162.
(6) [1929] A. C. 242.
(7) Ibid. 255.
(8) [1927] A. C. 674.

and affirmed the proposition that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. At the hearing in this reference their Lordships were in complete accord with this opinion of the previous Board, and intimated to the Attorney-General that they would not require argument from him in reply." Later on (1) the judgment proceeds: "The Minute," i.e., the Treasury Minute of March 20, 1922, "was issued by the Commissioners of the Treasury in pursuance of the discretion entrusted to them. It was submitted to Parliament and is binding upon the servants of the Crown. It announces the decisions of the Treasury on certain disputed matters regarding the calculation of the bonus for the purpose of computing the retiring allowances."

In view of the exhaustive examination of the relevant enactments by Lord Buckmaster in *Considine's* case (2) and of the weighty opinions expressed in the House of Lords and in the Privy Council I think that the matter is concluded so far as this Court is concerned and I do not propose again to go through the numerous sections in the statutes to which Mr. Schiller has called our attention or to give my own reasons for respectfully concurring in the opinion that *Cooper's* case (3) and *Yorke's* case (4) were rightly decided and that the award of the Treasury based on the Minute of March 20, 1922, is binding on the plaintiffs.

Before leaving this part of the case however it is right to say a few words about the case of *In re Lupton* (5), which undoubtedly lends colour to the argument addressed to us by Mr. Schiller. The question for decision there was whether a lump sum granted by the Treasury by way of additional allowance to a retired civil servant under s. 1, sub-s. 2, of the Superannuation Act, 1909, was "compensation granted by the Treasury" within the meaning of s. 53, sub-s. 2, of the Bankruptcy Act, 1883, or was a mere gratuity and as such formed part of the property of the bankrupt divisible amongst his creditors under s. 44 of that Act. Phillimore J. decided

(1) [1929] A. C. 255.
(2) [1916] 2 A. C. 162.
(3) 14 Ch. D. 311.
(4) [1915] 1 K. B. 852.
(5) [1912] 1 K. B. 107.

in favour of the latter view and in the course of his judgment said (1): "It is not an optional sum in the sense that the Treasury can make the sum larger or smaller, but it is optional in the sense that they can decide whether to grant it or not. If they make the gift, it must be of a certain amount, as I read the section." The Court of Appeal reversed the decision of the learned judge and held that although the grant of the lump sum was optional on the part of the Treasury it was nevertheless "compensation granted by the Treasury" within the meaning of s. 53, sub-s. 2, of the Bankruptcy Act, 1883, and in the judgments of Cozens-Hardy M.R. and Fletcher Moulton L.J. there are certain passages which were rightly relied upon by Mr. Schiller. The Master of the Rolls dealing with s. 1 of the Superannuation Act, 1909, said (2): "Now, as a question of construction of s. 1, sub-s. 2, I think it is plain that there is a difference between the right to the one-eightieth—that is something which he is said to be entitled to—and the lump sum which the Treasury may grant. I think it is impossible to say that a civil servant has the same claim to the lump sum as he has to the one-eightieth." Fletcher Moulton L.J. said (3): "With regard to the first point I do not think that it is capable of doubt that there is a distinction between sub-s. 1 and sub-s. 2 of the 1st section of the Superannuation Act, 1909. Whereas the civil servant is entitled, as of right, to the allowance under the one, the additional allowance under the other is given only if the Treasury think fit to give it; they cannot be compelled to give it." The conclusion arrived at by the Court of Appeal was that the expression "compensation granted by the Treasury" in s. 53 of the Bankruptcy Act, 1883, fairly covered all payments made by the Treasury in respect of the cessation of employment whether optional or otherwise, it was therefore really immaterial to determine whether or not a retired civil servant was entitled to a superannuation allowance as of right. *Cooper's* case (4) was not cited and no argument appears to have been addressed to the Court on the question

(1) [1912] 1 K. B. 109.
(2) Ibid. 114.
(3) [1912] 1 K. B. 115.
(4) 14 Ch. D. 311.

whether the bankrupt had a legal right to a superannuation allowance; it seems to have been assumed that he had such a right. *In re Lupton* (1) was not cited in *Yorke's* case (2) nor in *Considine's* case (3), but having regard to the subsequent recognition of the decisions in *Cooper's* case (4) and in *Yorke's* case (2), both in the House of Lords and in the Privy Council, and to the decision in *Considine's* case (3), I am of opinion that the dicta of the Master of the Rolls and Fletcher Moulton L.J. in *In re Lupton* (1) that a retired civil servant is entitled to a superannuation allowance as of right are not well founded and ought not to be followed.

On the first question therefore I am of opinion that this appeal fails.

The second question to be determined, which affects only the plaintiffs Nixon and Clark, is whether these two plaintiffs made special contracts with the Crown that on their retirement they should receive a superannuation allowance calculated in accordance with the Treasury Minute of 1859.

It was contended on their behalf that this Minute constituted a continuing offer on the part of the Treasury that any person entering the Civil Service should on retirement become entitled to a superannuation allowance according to the scale prescribed by s. 2 of the 1859 Act and that this offer had been accepted by these two plaintiffs who had read the Minute and had entered the Civil Service on the faith of the statements therein contained. A similar contention was originally put forward on behalf of the plaintiff Samuel, but at the trial he failed to prove that he had seen a copy of the Minute of 1859 before he entered the Civil Service or had in any way relied upon its contents. Accordingly in this Court this part of the case was confined to the two plaintiffs Nixon and Clark.

In so far as the Minute of 1859 dealt with the manner in which the Treasury intended to exercise its discretion in fixing the amount of the superannuation allowances of future civil servants under the provisions of ss. 2 and 17 of the

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(1) [1912] 1 K. B. 107.
(2) [1915] 1 K. B. 852.
(3) [1916] 2 A. C. 162.
(4) 14 Ch. D. 311.

1859 Act, it was a purely domestic document and (in view of the repeal of s. 24 of the 1834 Act) it was unnecessary to lay it before Parliament. As however the Minute also contained an order or warrant as to computing the amount of superannuation allowances to persons holding professional and other special offices made under s. 4 of the 1859 Act, it was necessary that the Minute should be laid before Parliament in accordance with the provisions in that behalf contained in that section. This probably explains how the Minute came to be printed and eventually found its way into the guide book which was published by a Society formed by or on behalf of Civil Servants for the information of intending candidates for the Civil Service. Be that as it may however, I am clearly of opinion that the Minute was not and was never intended to be such an offer as is suggested by counsel on behalf of these two plaintiffs, and that no such contracts as alleged were constituted between them and the Crown even if the Treasury had power to enter into such contracts on behalf of the Crown, which I doubt.

There only remains the question whether the plaintiff Scott stands in any better position than his co-plaintiffs by reason of the fact that he was transferred to the Civil Service from the position which he held in the National Telephone Company when that concern was taken over by the Government.

His position as regards superannuation is regulated by s. 6 of the Telephone Transfer Act, 1911, s. 10 of which Act provides that so far as it relates to employees of the National Telephone Company, it is to be read as one with the Superannuation Acts, 1834 to 1909.

The plaintiff Scott had entered the service of the National Telephone Company in 1895, he was a contributor to the Company's pension fund, and on being transferred to the Civil Service assigned his share in that fund to the Postmaster-General; consequently his service with the Company was to be treated as service in the office to which he was first transferred for the purpose of his qualification for a superannuation allowance under the Superannuation Acts.

In the circumstances the effect of s. 6 of the Telephone Transfer Act, 1911, was to place the plaintiff Scott, qua superannuation allowance, in the same position as if, instead of having entered the Civil Service in 1911, he had entered that service in 1895.

There is nothing in s. 6 which tends to support the view that the plaintiff Scott acquired any legal right to a superannuation allowance by reason of his having assigned his share in the National Telephone Company's pension fund to the Postmaster-General. What the plaintiff Scott did acquire on his acceptance of the transfer and on the assignment of his share in the pension fund was the expectation, amounting to a practical certainty, that he would receive a superannuation allowance in accordance with the Superannuation Acts, 1834 to 1909, on the hypothesis that he had entered the Civil Service in 1895, but nothing more.

In the result, for the reasons stated, I am of opinion that this appeal fails and ought to be dismissed.

Romer L.J. The appellants, plaintiffs in the Court below, were formerly employed in the permanent Civil Service of the State. They retired from that service at varying dates and thereupon became entitled, at any rate, to expect to receive superannuation allowances under the provisions of the relevant Superannuation Acts. In due course the Lords Commissioners of the Treasury awarded to each of the appellants a superannuation allowance calculated in accordance with a certain Treasury Minute of March 20, 1922. With these allowances the appellants were dissatisfied, contending that they are entitled as of right to have the amount of their superannuation allowances calculated in the manner prescribed by s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3, sub-s. 1, of the Superannuation Act, 1909, and that the Treasury Minute of March, 1922, so far as it purports to put any limitation on that right is null and void. The right so asserted is claimed by the appellants to have been conferred upon them by the Superannuation Acts themselves. Alternatively, it is claimed by the appellants Nixon and Clark that the right accrued to them under and as one of the terms of the contracts of service under which they were respectively employed. In the case of the appellant John Scott, he founds his alleged right alternatively upon the provisions of the Telephone Transfer Act, 1911.

For the purpose of establishing these rights so claimed, the appellants instituted this action against the Attorney-General. In due course the matter came before Clauson J., who dismissed the action, and it is from that decision that the present appeal is brought.

In so far as the claim of the appellants is based upon the Superannuation Acts themselves, the learned judge held that those Acts do not confer upon civil servants any rights that can be enforced in a Court of law. In so holding, the learned judge was in my opinion right, both on principle and on authority. For the purpose of considering this question it is not, I think, necessary to go back further than the Superannuation Act of 1834. Nor is it necessary that I should read any of the sections of that Act at length. Admittedly none of them expressly confers upon civil servants a right to have granted to them superannuation allowances. Sect. 18 provides that no such allowance shall be granted, allowed or paid other than under the authority of an Order in Council or by the Commissioners of the Treasury, and ss. 9 and 10 enact that the allowances shall not exceed certain limits. The whole Act seems to be one passed for the purpose of authorizing the expenditure of public money and defining the circumstances and manner in which it shall be expended, and not one passed for the purpose of conferring rights upon any class of public servants. It is, indeed, expressly enacted by s. 30 that nothing in the Act shall extend or be construed to extend to give any person an absolute right to any superannuation or retiring allowance under the Act. Notwithstanding this section, the appellants contended before us that we ought to construe the Act as extending to give them an absolute right to the allowances that they are claiming by reason of the use in certain sections of the word "entitled."

In s. 27, for instance, the Act refers to "persons . . . . at present holding office and entitled to superannuation allowance under this Act." But it is in my opinion reasonably clear that the word means no more than "entitled to expect" or "qualified to receive"; and this would seem to be in accordance with the opinion expressed by Lord Buckmaster in the case of *Considine* v. *McInerney* (1), to which I must presently refer. In any case s. 30 would prevent the Court from giving to the word the effect contended for by the appellants. I do not forget that Mr. Schiller attempted to draw a distinction between right and absolute right, but for myself I can see no difference between the one and the other for the present purpose. If the appellants have not an absolute right to the superannuation allowances they are now claiming, their action was rightly dismissed.

The next Act that has to be considered is the Superannuation Act, 1859. By that Act certain sections of the Act of 1834 were repealed, but these sections did not include s. 30. This section has therefore to be treated as governing the provisions of the 1859 Act by reason of s. 18 of this latter Act. This fact alone would seem to render it impossible to spell out of the 1859 Act a right in the civil servant to claim the superannuation allowances thereby made permissible. But, except for this, there is much more material to be found in this Act on which to base the claim of the appellants than was afforded by the Act of 1834. For, whereas ss. 9 and 10 of the earlier Act merely provided that the allowances should not exceed certain limits, s. 2 of the later Act in terms provides that, subject to certain exceptions and provisions, the superannuation allowance to be granted after the commencement of the Act to civil servants "shall" be as therein mentioned. By s. 9 moreover the Commissioners are expressly empowered to grant to any person any such allowance of less amount than otherwise would have been awarded to him where his defaults or demerits in relation to the public service appear to them to justify such diminution. Why, it is asked, should this change of language occur in s. 2, and what was the necessity for this express power conferred by s. 9, if the Legislature intended the grant and the amount of the pension to be a matter of grace and not of right? I think that the explanation is as follows: The Commissioners of the Treasury in the exercise of the powers conferred upon them by the 1834 Act were, I strongly suspect, in the habit of always granting the maximum pensions allowable. When, therefore, the Legislature was passing the amending Act of 1859 for the purpose of apparently further defining the powers of the Commissioners, it might quite intelligibly have done so in the language employed in the Act, without intending to confer upon the civil servants a legal right to have the pensions awarded to them. It would, on the other hand, be very surprising if the Legislature when conferring such a right for the first time should have made so great a change in the law by such vague and ambiguous language. But, apart from these considerations, there is to be found in s. 2 itself some evidence that such was not the intention of the Legislature. When providing for an addition to the annual allowance of one-sixtieth of the annual salary and emoluments in respect of each year of service after eleven years until the completion of a period of service of forty years, the section says: "When the annual allowance of forty-sixtieths may be granted"—words which would scarcely have been used if there was being conferred a right to have them granted. Finally, there is the proviso to the section which enacts that if any question should arise as to the claim of any person or class of persons for superannuation under the clause, it shall be referred to the Treasury Commissioners, whose decision is to be final.

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(1) [1916] 2 A. C. 162.

The appellants seek to escape from the operation of this proviso by contending that it merely confers upon the Commissioners the power of determining the question whether a person or a class of persons is or is not qualified to receive an allowance, and that when once this question has been determined in favour of the claimant, he becomes entitled as of right to receive a pension calculated as mentioned in the section as amended by the Act of 1909. But the proviso refers to "any" question, which would seem to include a question whether a claimant is entitled to receive the allowances mentioned in the clause and nothing less, or the question as to how the war bonus was to be treated for the purpose of ascertaining the emoluments of a civil servant. I should hesitate long before attributing to the Legislature the intention of conferring upon the Commissioners the power of deciding whether a pension shall or shall not be conferred without having the power of deciding of what amount up to the permitted maximum that pension shall be. But, even if I could agree with the appellants as to the construction of the proviso, I should still have to find something in the Act conferring upon the appellants, either expressly or by necessary implication, this right that they are asserting, and that I have been unable to do. In my opinion, the Act does no more that is material to the present question than to alter the scale of allowances that might be granted by the Treasury out of the public purse. No right to the allowances existed before the passing of the Act, and no right existed afterwards. I do not forget that this Act also contains numerous references to persons being "entitled" to superannuation allowances. But the observations I have made upon the use of this word in the Act of 1834 apply equally to the Act of 1859. I cannot in the face of s. 30 of the former Act treat the word as conferring upon civil servants a legal right to the allowances.

The only other Act to which I need refer is the Superannuation Act of 1909. Sub-s. 1 of s. 1 merely alters the method of calculation of the superannuation allowance in the case of civil servants who enter the service after the passing of the Act, and sub-s. 2 in terms provides that in certain cases the Treasury may grant an additional allowance. Mr. Schiller reserved to his clients the right of contending before the House of Lords that the word "may" in this sub-section means "must." He did not feel justified upon the authorities in presenting that contention before this Court. I therefore treat the sub-section as being merely permissive, and that being so I can find nothing in the section or in any other part of the Act that would warrant me in coming to the conclusion that it confers any legal rights upon the members of the Civil Service.

So far, therefore, as the Statutes are concerned, I should, even apart from authority, have come to the conclusion that the appellants have no such legal rights as they assert. The matter is, however, in my opinion, concluded by authority binding upon this Court.

In *Cooper* v. *The Queen* (1), decided in the year 1880, Malins V.-C. held that under the Act of 1834 a servant of the Government had no legal rights conferred upon him, but that he had to depend upon the bounty of the Crown whether he was to have the whole amount of the superannuation allowances mentioned in the Act or any part which the Commissioners might think fit, or what they would take into consideration or what they would not. He added that this was made still more clear by the Act of 1859, and said that he was clearly of opinion that no claim for superannuation allowance to persons under the Acts could in any case be enforced by the civil tribunals of the country.

That case was followed by Lush J. in the case of *Yorke* v. *The King.* (2) He held that a civil servant has no legal right to ask the Court to decide either that he is entitled to a pension or as to the basis upon which it is to be calculated. These two cases are not, of course, binding upon this Court. The meaning and effect of the Superannuation Acts, however, were considered in the House of Lords in the case of *Considine* v. *McInerney.* (3) Inasmuch as it was contended before us that the observations upon the Acts made by Lord Buckmaster in the course of his speech were merely obiter, it is necessary to examine the case a little closely in order to see what was the point involved in the appeal. A servant of the Government became permanently incapacitated by an accident arising out of and in the course of his employment. A short time afterwards he was retired from the Government's service owing to this incapacity and was thereupon paid a lump sum as a gratuity and was awarded a superannuation allowance under the provisions of ss. 2 and 10 of the Act of 1859 as amended by s. 1 of the Act of 1909. He then made a claim for compensation under the Workmen's Compensation Act, 1906, and the question to be determined was whether, in fixing the amount of the weekly payment to be made to him, regard was to be had to the gratuity and superannuation allowance; in other words, whether they were payments, allowances or benefits within the meaning of para. 3 of the First Schedule to that Act. In order to decide this question, it was necessary to ascertain the nature of the allowances made under the Superannuation Acts, inasmuch as the House of Lords had previously decided that it is not every payment, allowance and benefit received from the employer that has to be regarded under the Schedule. It all depends upon the nature of it. Now Lord Atkinson and Lord Shaw were of the opinion that regard had to be paid to the allowances in question on the ground that they came out of the pocket of the employer—namely, the State. They did not therefore express any opinion upon the question whether the servant had a legal right to the allowances. Lord Loreburn decided the case on the same ground. He thought it made no difference whether the employer was or was not obliged by the Superannuation Statutes to pay them. But he definitely stated his view that the employer was not so obliged. Lord Buckmaster, on the other hand, would appear very largely to have based his decision upon the ground that those Statutes did not give any legal right to the employee. The employee's counsel had argued that a civil servant has a right to a pension, or, if not a right, an expectation so certain that every one would act upon it. He referred, amongst other things, to the use of the word "entitled" in the Acts. In reference to this argument, Lord Buckmaster said (1): "It is, I think, desirable to state the provisions of the various Acts, under which this pension arises, in order that the true position of the respondent under these statutes may be ascertained before testing the soundness of this contention." He then proceeded to examine

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(1) 14 Ch. D. 311.

(2) [1915] 1 K. B. 852.

(3) [1916] 2 A. C. 162.

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(1) [1916] 2 A. C. 168.

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the Acts. He referred to the words "entitled to superannuation allowance under this Act" that occur in the 1834 Act and said this: "I am unable to regard these words as anything but a description of the class of persons to whom the superannuation allowances would be paid, and indeed by s. 30 it is expressly provided that nothing in the Act shall be construed to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under the Act." He then referred to the Act of 1859, stating that it imposed a different scale from that provided by the Act of 1834. He then considered the Act of 1887, and especially s. 10 of that Act, in which reference is made to the "rights" of a civil servant, and said (1): "Those rights were never of such a character as could enable a civil servant to compel their enforcement in his favour." Then, after stating that the Act of 1909 had not altered the fundamental position established by the then existing Acts, he summed up the matter as follows: "His position, therefore, under the statutes may be summarised as follows: He was entitled to expect an annual allowance at the rate of one-eightieth for every year of service which he had served, and a lump sum down. . . . . This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings." He concluded his speech as follows: "I have carefully considered the words of the schedule in order to see if any limitation can be placed on these words which would exclude such a payment as the one in question from their operation; but I have been unable to discover any rule or principle by which such limitation could be imposed."

Now the payment in question was one that possessed, amongst others, the character of not being legally enforceable, and it must, I think, be taken that it was the possession of this character, though no doubt amongst others, that made Lord Buckmaster unable to exclude the payment from the category mentioned in the Schedule. For these reasons, I regard Lord Buckmaster's observations not merely as obiter

(1) [1916] 2 A. C. 170.

dicta, but as a substantive decision that a civil servant has no legal right to the superannuation allowances mentioned in s. 2 of the Act of 1859 and s. 1 of the Act of 1909. This apparently was the view of the case taken by Lord Cave L.C. when delivering the judgment of the Privy Council in *Wigg* v. *Attorney-General for the Irish Free State.* (1) He said in reference to the cases of *Cooper* v. *The Queen* (2) and *Yorke* v. *The King* (3): "Their Lordships do not question the authority of those decisions, which indeed was recognized by the House of Lords in *Considine* v. *McInerney.*" (4) Now Lord Buckmaster was dealing with a case where the allowances had in fact been awarded, and yet he held that the recipient had no legal right to such allowances. In the present case the Treasury Commissioners have decided that allowances should be paid to the appellants. That fact, according to the appellants' argument, entitles them as of right to receive allowances calculated in the manner indicated in s. 2 of the Act of 1859 as amended by s. 1 of the Act of 1909. In my opinion, *Considine's* case (4) is a direct authority to the contrary. If and so far as the statements of Phillimore J. in *In re Lupton* (5) are inconsistent with this, I am unable to agree with them. In reference to sub-s. 2 of s. 1 of the Act of 1909 he said: "The Treasury is empowered to grant, in addition to the pension, a lump sum. It is not an optional sum in the sense that the Treasury can make the sum larger or smaller, but it is optional in the sense that they can decide whether to grant it or not. If they make the gift it must be of a certain amount, as I read the section."

I cannot, however, think that that learned judge intended to intimate that the sub-section conferred any legal rights upon a civil servant. He must, I think, have been looking at the matter merely from the view of departmental routine. It would be fantastic to suppose that the Legislature left it to the Commissioners to say whether a gift should be made or not and gave to the donee a legal right of insisting that the gift when once decided on should be of a particular amount. I find some difficulty in conceiving the existence in law of a donor who, having announced his intention of presenting another with ten shillings, becomes ipso facto under a legal liability to hand over a sovereign. Certainly in the judgments of Cozens-Hardy M.R. and Fletcher Moulton L.J. given on the appeal in the same case no suggestion is to be found that the Crown occupies so anomalous a position. They both said that the Treasury were under no obligation to make the additional allowance referred to in the second sub-section without drawing any distinction between cases where the Treasury have decided to make the gift and cases where they have not. But I ought not to leave that case without alluding to Fletcher Moulton L.J.'s statement that a civil servant is entitled as of right to the allowances mentioned in sub-s. 1 of s. 1 of the Act of 1909. The statement was purely obiter, and cannot be treated as an authority. The point does not appear even to have been argued, and neither the case of *Cooper* v. *The Queen* (1) nor that of *Yorke* v. *The King* (2) was cited.

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(1) [1927] A. C. 674, 678.
(2) 14 Ch. D. 311.
(3) [1915] 1 K. B. 852.
(4) [1916] 2 A. C. 162.
(5) [1912] 1 K. B. 107, 109.

In my opinion the Statutes confer no right upon the appellants to the declarations sought by them. On this part of the case I will only add this. In *Wigg* v. *Attorney-General for the Irish Free State* (3) Lord Cave, when referring to the Treasury Minute of March 20, 1922, said this: "The minute was the outcome of a long discussion between the Treasury and the British civil servants as to the pensionable character of the bonus, and it is no doubt operative as to officers remaining in the service of the Crown in Great Britain."

For the reasons that I have given, I think so too.

The claim advanced alternatively on the part of the appellants, Nixon and Clarke, can be dealt with quite shortly. They allege that they entered into the service of the Crown in reliance on, and upon the terms of, a Treasury Minute of June 14, 1859. They say that this Minute was issued to the public by or on behalf of the Crown and constituted an offer

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(1) 14 Ch. D. 311.
(2) [1915] 1 K. B. 852.
(3) [1927] A. C. 674, 683.

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of service under the Crown upon the terms of the Minute, and that they both accepted the offer so made and accordingly that their contract of service with the Crown incorporates the terms of that Minute. I need not state the terms of that Minute, or consider what the position of the two appellants would have been had the Minute in fact been issued to the public. For it seems to be quite clear that it never was so issued. The Minute appears to have been merely a domestic document prepared for the information of other Government departments and never issued to the public or for public sale by or on behalf of the Treasury or of any other agent for the Crown. It is true that a portion of it was subsequently printed in the Civil Service Year Book, and was there seen and read by the two appellants before entering the Civil Service. That was, however, a private publication for which the Crown was in no way responsible. The appellants' contention that the terms of the Minute are incorporated into their contract of service fails, in limine, and was rightly rejected by the learned judge.

It only remains to deal with the alternative claim advanced by Mr. Scott, based upon the provisions of the Telephone Transfer Act, 1911. As to this the learned judge held that this gentleman has, with the modifications indicated in the Act, come into precisely the same position as any other civil servant as regards superannuation allowance; in other words, he has no other right than the expectation to which Lord Buckmaster referred in *Considine's* case. (1) I do not propose to refer in detail to the provisions of the Act. It is sufficient to say that I have looked at those provisions to see if I can find anything to confer upon any transferred officer a legal right not possessed by other civil servants, and have looked in vain.

For these reasons I am of opinion that the learned judge was right in his conclusions and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Percy Robinson & Co.; Treasury Solicitor.*

H. C. G.

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(1) [1916] 2 A. C. 162.

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Jan. 21, 22;
Feb. 18, 19,
20, 21, 24,
25; March 7.

ATTORNEY-GENERAL *v.* GUARDIANS OF THE POOR LAW UNION OF TYNEMOUTH.

[1929. A. 1646.]

Poor Law—Guardians of the Poor—Outdoor Relief—Unemployment due to Trade Dispute—Relief to Families of Unemployed by Way of Loan—Undertaking to repay—Weekly Instalments or Deductions from Wages—Loans partly repaid—Resolution of Guardians to cancel Balance of Loans—No discretionary Power to release Debtors—Not a reasonable Exercise of lawful Discretion—Ultra vires—Relief Regulation Order, 1911, *Arts. XII. and XIII.—Poor Law Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 14), *ss.* 45, 46, 163.

The defendants, a board of guardians, upon the outbreak of the coal dispute of 1926 resolved to give outdoor relief to the wives and families of miners and other workmen who were unemployed because of the dispute, and that such relief should be given by loan, subject to an undertaking to be given by the head of each household to repay the loan by weekly instalments, or (by arrangement with the employers) deductions from wages to commence five weeks after the resumption of work.

In pursuance of this resolution the defendants granted relief to miners' families during the continuance of the dispute to the amount of 195,957*l.* Repayment commenced in January, 1927, the terms being modified from time to time. On July 11, 1929, the total balance due on the loans was 145,924*l.*, and it was then being repaid by about 5000 miners at the rate of nearly 400*l.* a week, some having already repaid their loans in full, and others having been entirely released from payment.

On that day the defendants passed a resolution that the whole balance of the loans owing in respect of relief received by miners' wives and families should be excused and cancelled:—

Held, in an action by the plaintiff at the relation of the corporation of a borough situate and owning rateable property within the defendants' area that the resolution to cancel the loans was ultra vires and void and must not be acted upon.

Held, further, that even if there was any general discretionary power in the defendants to release the debtors, it was not properly or reasonably exercised, as they had considered solely the interest of the debtors, without any inquiry into the ability of all or any of them to continue paying off their loans, there being no evidence of any general inability to repay, or request for the cancellation of the debts.

Roberts v. *Hopwood* [1925] A. C. 578 applied.

WITNESS ACTION.

The action was brought by the plaintiff on the relation of the Mayor, Aldermen and Burgesses of the County Borough of Tynemouth, which was within the area of the defendants' Poor Law Union, for a declaration that a resolution passed by the defendants in July, 1929, excusing and cancelling the balance of moneys owing by miners and other workmen in respect of outdoor relief given on loan by the defendants during the coal dispute of 1926 was ultra vires, void and of no effect, and for an injunction to restrain the defendants from acting or purporting to act or continuing to act in pursuance of the resolution, and for a mandatory order to compel the defendants to take proper steps for the recovery of the balance. The relators sued as ratepayers within the defendants' Union.

In April, 1926, there was a dispute as to wages and hours of work in the coal trade, which culminated in a complete stoppage of work in coal mining for over six months from May to December, 1926. By a resolution passed on May 20, 1926, the defendants in pursuance of the power conferred upon them by the Relief Regulation Order, 1911, Arts. XII. and XIII., resolved (inter alia) that outdoor relief should be given to the wives and families of destitute men who were unemployed owing to the dispute, and that such relief should be given upon loan subject to an undertaking to be given by the head of the household relieved that he would commence to repay the loan made to him for relief by weekly instalments of 5 per cent. upon every complete 1*l*. of wages, to commence upon the expiration of five weeks from the date after he resumed work. By arrangement with the employees it was agreed that such instalments might be deducted from the wages, but no repayment was expected from any miner or workman earning less than 30*s*. per week. As a rule arrangements were made with the employers, and the instalments were deducted from the wages paid.

The coal dispute came to an end on December 2, 1926, and the date for the commencement of repayment was fixed as January 8, 1927. During the dispute the sum of 195,957*l*. 6*s*. 6*d*. had been expended in outdoor relief to the wives and dependants of 9036 miners within the defendants' Union. On January 13, 1927, the clerk to the defendants reported to the Central Relief Committee that approximately 8000 accounts had been sent out to men who had resumed work. On June 16, 1927, the defendants modified the rates of repayment by providing that the weekly instalments payable should be at the rate of 2½ per cent. on every complete 1*l.* up to 2*l.* 10*s.* and 5 per cent. on every complete 1*l.* of 2*l.* 10*s.* and over for the nine months from July 2 then next.

From early in March, 1929, representations were made to the defendants by branches of the Northumberland Miners Association and lodges of the Tynemouth Labour Party, urging that the balance then owing of the loans made for relief ought to be written off and cancelled, and a statement was made in correspondence that other Boards of Guardians had cancelled similar loans. No such cancellation had in fact taken place. The evidence as to these matters is fully stated in the judgment of the learned judge.

On March 27, 1929, the Local Government Act, 1929, received the Royal Assent and became law. Under the provisions of this Act the defendant board would cease to exist on the appointed day, March 31, 1930, and the right to recover any payments made by way of poor relief to persons resident in the County Borough of Tynemouth is transferred to and vests in the relators. On July 11, 1929, the defendants, after a short discussion, adopted and passed a resolution that as from July 15, 1929, the balance of the loans owing by the miners and other workmen in respect of relief received by their wives and families during the coal trade dispute of 1926 should be excused and cancelled and that all minutes of proceedings of meetings of the defendants which in any way conflicted with that decision should be rescinded. At that date the balance of loans outstanding amounted to 145,924*l.*, which was being paid off at the rate of approximately 400*l.* a week by some 5000 miners. Of the remainder 727 had repaid their loans in full, 119 had been excused altogether, and 3188 were not then paying any contributions owing either to their being out of work, sick, or earning less than 30*s.* a week. The plaintiff issued the writ in the action on August 7, 1929, for a declaration that the resolution of July 11 was ultra vires and void, and for an injunction to restrain the defendants from proceeding on it.

The defendants, by their defence, denied that the resolution was ultra vires, and pleaded that the relief granted in 1926 was so granted in exercise of their discretionary powers under the Relief Regulation Order, 1911, and the Poor Law Act, 1927 (1), and that they were not bound to keep the loans on foot or to take proceedings for their recovery, that in passing the resolution they were not influenced by any extraneous considerations, or actuated by any improper motive, and that the Court had no jurisdiction to grant any relief.

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(1) Poor Law Act, 1927, s. 45: "Any relief, or the cost thereof, which is given to or on account of any person above the age of twenty-one, or to his wife, or to any member of his family under the age of sixteen, and which the Minister by any rule, order, or regulation directs to be given or considered as given by way of loan, and whether or not any receipt for such relief, or engagement to repay the same or the cost thereof, or any part thereof, has been given by the person to or on account of whom the relief was given, shall be considered a loan to such person."

Sect. 46: "(1.) Any relief granted by way of loan to any person may be recovered in the county court or other court for the recovery of small debts for the district wherein the poor law union or the greater part thereof is comprised, on the plaint of the board of guardians.

"(2.) Where any relief has been given by way of loan, or where any relief or the cost thereof is treated as a loan in accordance with the provisions of this Act or any rules, orders or regulations made thereunder, any justice of the peace may, upon the application of the board of guardians providing the relief, and upon proof that the relief was given to or on account of any person, and that the sum due or any part thereof remains unpaid, issue a summons to such person requiring him and his employer to appear before a court of summary jurisdiction, at a time and place to be named in the summons, to show cause why any wages due to him, or which may from time to time become due to him, from his employer should not be paid over, in whole or in part, to the board."

Relief Regulation Order, 1911, December 28, 1911, Art. XII.: "If the Guardians shall, upon consideration of the special circumstances of any particular case, deem it expedient to depart from any of the Regulations hereinbefore contained (other than the Regulations contained in Articles VII. and VIII.), and within twenty-one days after the departure report the same and the grounds thereof to the Board, then if—

(*a*) The relief given shall have been relief in kind afforded in a particular instance of emergency, or

(*b*) The relief shall not have been given after notice from the Board disapproving thereof, or

(*c*) The Board approve of the departure, the relief granted shall, if otherwise lawful, not be deemed to be unlawful or be subject to be disallowed."

Art. XIII.: "No relief which may be contrary to the Regulations contained in this Order shall be given by way of loan; but any relief which may be given to, or on account of, any person above the age of twenty-one, or to his wife, or any member of his family under the age of sixteen, in accordance with these Regulations, may, if the Guardians think fit, be given by way of loan."

Sir Herbert Cunliffe K.C., *Scholefield K.C.* and *W. T. Monckton K.C.* for the plaintiffs. The action of the defendants in resolving to remit and cancel the whole balance owing of the loans made to the miners and their families is ultra vires and void.

They have no power to remit loans or cancel debts wholesale ; they can only do so in individual cases, on the application of the debtor, and after carefully considering all the circumstances of each particular case : *Reg.* v. *Vestry of St. Pancras.* (1) "They must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one," per Lord Esher M.R.

Assuming the defendants had a discretion, here they have taken into consideration extraneous matters which should not have any weight with them at all. In particular the defendants were influenced by the pressure brought to bear on them by certain local branches of the Northumberland Miners Association, and lodges of the Tynemouth Labour Party, and by the fact that on the passing of the Local Government Act, 1929, which took place on March 27, 1929, they would be abolished as a Board as from March 31, 1930, and their functions as Poor Law Guardians and the right to recover any outstanding moneys representing relief granted by way of loan would vest partly in the relators and partly in the Northumberland County Council.

If there is any discretion at all to remit these loans it has been exercised in an arbitrary manner, and that is not a lawful exercise of such discretion : *Roberts* v. *Hopwood* (2), where it was held ultra vires of the Poplar Guardians to pay their servants wages above the ordinary standard rate, having regard to the cost of living.

(1) (1890) 24 Q. B. D. 371, 375.

(2) [1925] A. C. 578.

The doctrine of ultra vires is fully stated in *Ashbury Railway Carriage Co.* v. *Riche.* (1) It will authorize the doing of anything which is fairly and properly incidental to those things which the Legislature has authorized, unless expressly prohibited: *Attorney-General* v. *Great Eastern Ry.* (2) Guardians and other public bodies administering public funds are trustees of those funds, and any dealing with them contrary to law amounts to a breach of trust: *Attorney-General* v. *Aspinall.* (3) See also *Arnold* v. *Mayor, etc., of Gravesend* (4); *Attorney-General* v. *Wandsworth District Board of Works* (5); *Attorney-General* v. *West Hartlepool Improvement Commissioners.* (6)

If the defendants have power to do what they have done here, the onus is upon them to show whence they derive such power. At the time that the balance of 145,924*l.* was remitted, it was being paid off at a rate exceeding 400*l.* a week by about 5000 men. The defendants are trustees for the ratepayers and cannot give away the funds entrusted to them, or relieve debtors from their admitted debts existing under written contracts.

[They also referred to the Poor Law Act, 1927, ss. 44, 45, 163; *Attorney-General* v. *Poplar Guardians* (7); and *Attorney-General* v. *Merthyr Tydfil Union.* (8)]

Preston K.C. and *C. R. D. Richmount* for the defendants. The defendants had power, in the exercise of their discretion, after taking all the circumstances into consideration, to pass a resolution cancelling and excusing the balance due on the loans. The original contracts had already been modified, and three separate rates of repayment have been in force from time to time. No condition was imposed on the defendant board by the Minister of Health that the relief granted should be by way of loan. The defendants in granting the relief did not discriminate between cases, and they were not bound to do so in cancelling the loans. The

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(1) (1875) L. R. 7 H. L. 653.
(2) (1880) 5 App. Cas. 473.
(3) (1837) 2 My. & Cr. 613.
(4) (1856) 2 K. & J. 574.
(5) (1877) 6 Ch. D. 539.
(6) (1870) L. R. 10 Eq. 152.
(7) (1924) 40 Times L. R. 752.
(8) [1900] 1 Ch. 516.

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doctrine of ultra vires must be reasonably understood and applied, and the action of the defendants was one reasonably incidental to the exercise of their express powers: *Attorney-General* v. *Great Eastern Ry.*, per Lord Selborne L.C. (1)

Under the Poor Law Act, 1927, s. 45, relief may be granted by way of loan where the Minister of Health by any rule or order directs that it shall be given or considered as given by loan, but this section is merely permissive. Here no such direction was given by the Minister. The relief was given under the powers of the Relief Regulation Order, 1911, and it is none the less relief though given by way of loan. The Guardians are not money-lenders but administrators of relief: *Chard* v. *Bush.* (2) See Macmorran & Lushington's Poor Law General Orders, 2nd ed., vol. i., p. 41.

The defendants are not liable in an action for an erroneous exercise of any discretion vested in them, in the absence of mala fides: *Partridge* v. *General Council of Medical Education.* (3) If the action of the defendants in remitting the loans was, as we submit, within their discretion, then the Court cannot interfere with the proper exercise of that discretion: *Short* v. *Poole Corporation* (4), per Warrington L.J.; *Fennell* v. *East Ham Corporation* (5); *Price* v. *Rhondda Urban Council.* (6) The only case of an action against guardians for granting relief to men unemployed by reason of a strike is *Attorney-General* v. *Merthyr Tydfil Union* (7), and there it was held that relief could be lawfully given to the wives and children of strikers, though not to the strikers themselves. It is submitted that some of the observations of Lord Atkinson in *Roberts* v. *Hopwood* (8) on the subject of ultra vires are mere obiter dicta, and go beyond the law.

The fact that the defendants made it a condition on the grant of these loans that they should be repaid does not prevent them in the exercise of their discretion from cancelling the debts, even if they are in the position of trustees of the funds.

(1) 5 App. Cas. 473, 478.
(2) [1923] 2 K. B. 849, 854.
(3) (1890) 25 Q. B. D. 90.
(4) [1926] Ch. 66, 90, 91.
(5) [1926] Ch. 641.
(6) [1923] 2 Ch. 372.
(7) [1900] 1 Ch. 516.
(8) [1925] A. C. 578, 595.

On the facts there is no evidence that the defendants' action was influenced by the approaching demise of the board. They considered the whole situation; there was no real voluntary repayment by any one, but the money was deducted from wages under compulsion.

[They also referred to *Kruse* v. *Johnson*. (1)]

Scholefield K.C. in reply. The regulation of outdoor relief by the Minister of Health now depends on s. 73 of the Poor Law Act, 1927. The recovery of relief given by way of loan is governed by s. 46 of the Act, replacing s. 59 of the Poor Law Amendment Act, 1834, which gave power to guardians to go to the justices and get an order for deduction of relief from wages. Sect. 46 is not merely permissive: *In re Hurst* (2); *Rex* v. *Board of Education* (3); *Rex* v. *Brighton Corporation* (4), per Lord Reading C.J. The Court, though slow to interfere with the discretion of local authorities, will do so where that discretion has not been lawfully exercised.

Cur. adv. vult.

March 7. EVE J. The claim to the relief sought in this action is founded upon the allegation that the passing of the resolution of July 11, 1929, was ultra vires of the defendants on one or other of two grounds, the one that they had no statutory right or power to do that which they purported to do, and the other that if they had such right or power they did not in fact exercise it reasonably or upon considerations which they were entitled to regard.

In resolving, as they did in May, 1926, that outdoor relief granted to the wives and families of destitute men, who were not in employment owing to the dispute in the coal trade, should be given on loan, the defendants were acting under the power conferred upon them by arts. XII. and XIII. of the Relief Regulation Order, 1911, whereby it is provided that any such relief may, if the guardians think fit, be given by way of loan. By the resolution in question, the defendants resolved that, as from July 15, 1929, the balance of the loans owing by the miners and other workmen employed in or about the

(1) [1898] 2 Q. B. 91, 99.

(2) (1890) 63 L. T. 665.

(3) [1910] 2 K. B. 165, 179.

(4) (1916) 80 J. P. 219, 222.

collieries in respect of relief received by their wives and families during the said dispute should be excused and cancelled, and that all minutes of proceedings of meetings of guardians, which in any way conflicted with that decision, should be rescinded. This statement does not reproduce the exact wording of the resolution; as passed, it was not in terms confined to workmen "employed in or about the collieries," but it is common ground that it was intended to be, and in fact has only been acted upon as so restricted.

The first question is, had the defendants any power to release and cancel the outstanding loans, or does the resolution involve an illegal act on their part? In order to arrive at the answer to this question, one must determine whether their act can fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized, and if it can, it ought not—unless expressly prohibited, and that is not suggested—to be held by judicial construction to be ultra vires: see per Lord Selborne L.C. in *Attorney-General* v. *Great Eastern Ry.* (1) What then is it that the Legislature has authorized? It has empowered the guardians to treat as a loan the relief which might lawfully be given outright in accordance with the regulations. Nothing can be lent beyond what could legally be given, and the power is one for application in cases within the regulations, where the guardians think fit to do something less than give the relief. It must be assumed that, in determining whether the power is to be exercised or not, the probability of the recipient being able to repay is the dominant consideration. I am not prepared to accept the view put forward that the exercise of the power clothes the guardians with all the attributes and rights of the lender under an ordinary contract of loan between individuals. It cannot be overlooked that they stand in a position of a fiduciary nature towards those whose monies will ultimately be utilized for meeting their commitments, and although it may well be that in settling the form of acknowledgment to be taken from the recipients of the relief—in determining and from time to time altering or

(1) 5 App. Cas. 473, 478.

modifying the instalments by which repayment is to be made in taking or in abstaining from taking steps to enforce repayment, in compromising claims with, and in justifiable circumstances in releasing, individuals from further liability, they may rightly be said to be doing nothing more than can fairly be regarded as incidental to or consequential upon the statutory power of relieving by way of loan, it is a wholly different matter when they assert a right uno flatu, with one stroke of the pen to release the whole outstanding debt and to make each debtor a present of the amount still owing from him and this without any regard to the fact that he and others may be both able and willing to repay. Such a proceeding is in no way incidental to or consequential on the statutory power—rather it is inconsistent with it.

It may well be that during the continuance of the dispute they might have resolved to discontinue making relief by way of loan, and thenceforward to substitute relief by gift, but that would have been quite a different resolution from one which purports to revoke everything that was in fact done and to create a state of affairs consistent—subject to such repayments as have been made—with what would have existed had the statutory power never been exercised. In my opinion the guardians had no power to act as they did and the relators are entitled to the declaration they seek that the resolution is ultra vires and void on the first of the two grounds upon which that relief is claimed.

But if, contrary to this opinion, it should hereafter be decided that there was vested in the guardians a general discretionary power to release the debtors, the question arises whether, even so, the discretion was exercised reasonably, bearing in mind that a discretion does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but what he ought—he must, by use of his reason, ascertain and follow the course which reason directs: see per Lord Wrenbury in *Roberts* v. *Hopwood*. (1) In order to answer the question, it is necessary to examine, with care, the circumstances in which the resolution came to be passed, and this I proceed to do.

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(1) [1925] A. C. 578, 613.

At the inception of the dispute between the colliery owners and the workmen in April, 1926, the defendants took into consideration the matter of providing for the outdoor relief of wives and families of destitute men not working owing to the dispute, and on May 6 formulated a series of recommendations dealing therewith, which were later on submitted to the Minister of Health, and, after a short correspondence with reference to the scale of relief, were ultimately approved by him on May 26. Among such recommendations were ones to the effect that the District Relief Committees should be empowered to grant outdoor relief to the said wives and families, that all such relief should be given on loan and subject to an undertaking by the head of the household that, at the expiration of five weeks from the time he recommenced work, he would commence to repay the relief so advanced by weekly instalments or (if such arrangement with the employer should be found to be practicable) by way of weekly deductions from his wages with a proviso that the rate of recovery should not exceed 5 per cent. on each complete 1*l.* of wages drawn, and that the clerk should arrange for an abbreviated form of case-paper to be prepared, specially for use in dealing with these cases, and that on every occasion the house should be visited and the particulars be considered and an order be made by the District Relief Committee in the ordinary way. The head of each household in due course signed an agreement to repay the total amount of relief received by his wife and family and arrangements were made whereby the repayments were to be deducted from his wages and paid by his employers to the defendants. Exception to these arrangements was taken by fifty-seven men out of the many thousands to whom relief was granted, but in these cases the defendants took legal proceedings and obtained orders under which the recalcitrants were all brought into line with the others.

The dispute came to an end on December 2, 1926, and, on the same day, the date for commencement of repayment was fixed as January 8, 1927. During the dispute, the dependants of 9036 miners had been relieved and the aggregate indebtedness in respect of such relief amounted to 195,957*l*. 6*s*. 6*d*. On the 13th the clerk reported to the Central Relief Committee that practically 8000 accounts had been sent out to men who had recommenced work, and the vice-chairman reported that the clerk and he had interviewed deputations from miners' lodges with regard to matters arising out of the repayment of relief. On March 10, 1927, the clerk reported to the same Committee that as a result of investigations made into the circumstances of certain miners whose dependants had received relief during the recent trade dispute, he had forwarded particulars relating to men who were in ill-health, or in advancing years, to the relief committees, with a recommendation that orders should be made in the guardians' ledgers excusing the amounts shown against such men.

On June 16, 1927, the guardians adopted the report of a special committee to which the question of modifying the rates of repayment had been referred, and agreed to vary the agreements by providing that repayments should be made for a period of nine months from July 2 then next at the rate of 2½ per cent. on the gross earnings of every complete pound up to 2*l*. 10*s*. per week, and at the rate of 5 per cent. on every complete pound of 2*l*. 10*s*. and over. This scale of repayment was continued for a further month in April, 1928, and in the following month was renewed for a further period of six months, with an added provision that no deductions were to be made from the wages of miners in receipt of wages below 30*s*. per week.

In July, 1928, when a resolution by the members of the Rising Sun Branch of the Northumberland Miners Association to the effect that no further deductions must be made for the guardians from their wages was brought before the defendants, they instructed the clerk to reply that if any of the men concerned desired to repudiate their debt it must be done in writing direct to the clerk, and that in the event of any such repudiation the guardians would have no option but to proceed to enforce their statutory powers to recover through the Courts, and in the following October, when they had to consider a letter signed by Mr. T. Elliott, on behalf of the Hartford miners, asking that they would reconsider the arrangements then in operation for deductions from miners' wages, their answer was that they were unable to see their way to depart from the scale of deductions then in operation.

It may, I think, fairly be said that down to the month of March, 1929, such complaints as had reached the defendants were restricted to the scale from time to time fixed for repayment of the debts. I am not overlooking the resolution of the Rising Sun Branch passed on July 1, 1928, but that came to nothing, and the letter of the clerk, after the matter had been considered, and dealt with, by the defendants contains the following passage: "The guardians direct me to express their surprise and regret that any of your members should endeavour, at this stage, to repudiate their honourable obligation, especially having in mind the fact that by the further amendment of the scale of repayment no man getting less than 30*s.* per week gross wages will be required to make any contribution whatever, and further having regard to the fact that (deplorable though the condition of their employment may be) the conditions in other collieries within the area are substantially worse, and in not a single instance, apart from the Rising Sun Branch, has any suggestion of repudiation of their obligations been made," and his evidence at the trial is to the same effect (Fifth Day, page 73). But in the early months of 1929, and certainly by the beginning of March, the passing of the Local Government Act, 1929, was assured, and it, in fact, became law on the 27th of that month. Under its provisions the defendant board will cease to exist on the appointed day, the 31st of the present month of March, and, subject to any arrangement which may be come to by the substituted authorities, the right to recover any payments made, or expenses incurred by the defendants by way of poor relief to recipients resident in the County Borough of Tynemouth at the date when the relief was granted, will, on the appointed day, be transferred to, and vested in, the Council of that borough.

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In these altered circumstances, the first communication which reached the defendants was a letter from the Rising Sun Branch, dated March 12, a copy whereof is to be found on page 51 of the correspondence. It is in these terms: "Northumberland Miners' Association. Rising Sun Branch. 12th March, 1929. Mr. T. Percival. Clerk. Tynemouth Union. Dear Sir, I am instructed from the members of the above Branch to write to you re their payments to the Guardians for the relief they received during lock-out. Other Boards in Durham and elsewhere have cancelled all payments, and our members consider what other Boards can do Tynemouth Board can do also. Hoping, Sir, you will do your uttermost to have those payments abolished, Yours faithfully, William Rivett, Secretary." The statement in para. 2 of that letter that: "other Boards in Durham and elsewhere have cancelled all payments" is quite inaccurate; nothing of the kind had been done. Next came a letter from the Edward Pitt Branch of the Northumberland Miners Mutual Confident Association, Wallsend, dated March 20, and to be found on p. 52 of the correspondence. It reads: "Northumberland Miners Mutual Confident Association. Wallsend. Edward Pitt Branch. 25th March, 1929. Mr. Percival. Dear Sir, At a meeting of the members of the above Branch held on Sunday, March 17th, I was instructed to forward you the following Resolution for the purpose of presenting same before your Board: 'That the whole debt incurred by the miners of the Tynemouth Board during the period of the coal stoppage, 1926, be written off.' Yours faithfully, E. McAndrew, Secretary." These two letters were brought before meetings of the Finance Committee, and of the board on March 21, and at the latter a special committee, consisting of the chairman and vice-chairman of the Board of the Central Relief Committee, and of the Finance Committee respectively, was appointed to consider and report on all questions arising in connection with the repayment of relief advanced on loan to able-bodied men and their dependants, with power to appoint representatives to attend any conference which might be held as the outcome of a resolution passed by the Board on

February 21 to the effect that the Emergency Committee (Poor Law Reform) should be requested to take into consideration the question of representations being made to the various Boards of Guardians in the county of Northumberland with a view to a uniform basis being adopted for the repayment by miners in respect of relief received by their dependants during the coal trade dispute, 1926, in view of the proposals for the transfer of poor law functions contained in the Local Government Bill then before Parliament, and the two letters I have read of March 12 and 20 were referred to this Special Committee. The appointment of this committee was notified to the secretaries of the Rising Sun and Edward Pitt branches on March 27. On April 14 Mr. William Wilkinson, the secretary of the New Delaval Lodge, wrote, by the instruction of the lodge members to Mr. Percival inviting him to go to Newsham "to meet us with a view to the possibility of your board agreeing to cancel or withhold the repayments due until such time as the miners are in a more favourable position to pay back the same," and on the 15th the hon. secretary of the Tynemouth Labour Party wrote asking Mr. Percival to place before the members of the Tynemouth Board of Guardians: "The following resolution from the above party for their consideration"—namely, "That this party are of opinion that the miners' debt to the Tynemouth Board of Guardians should be abolished during their term of office." These two letters were, on April 18, referred to the Special Committee. The Special Committee met on May 9 and June 13. Between the two meetings a conference had been held with the other Unions to consider the possibility of a uniform basis being adopted for the repayments by miners, but nothing definite had been settled. Mr. Percival had also received a letter from the secretary of the Burradon Branch of the Miners Mutual Confident Association in which the suggestion was made that: "The scale should be applied to net earnings as against the present system of charging on gross earnings," and the writer added: "This would, in our members' opinion, give equity and justice." This letter was also referred to the Special Committee, and, as will be seen from so much of their report as I am about to read, was considered with each of the other five letters I have read, or summarised, before their report was settled, and agreed at their meeting on June 13. The report is on page 85 of the bundle of documents No. 1. Throughout it contemplates a continuance of the collection of the moneys outstanding on account of relief. So far as it is material, it is in the following terms: "Repayment of relief. The Committee had before them the following communications: (1.) Rising Sun Branch and Edward Pitt Branch of the Northumberland Miners Association stating that other boards in Durham and elsewhere had cancelled all payments in respect of relief received during the coal trade dispute, and that the members of that Lodge considered that what other boards could do Tynemouth board could do also. (2.) Miners Lodge, New Delaval, asking the clerk to meet their representatives to discuss the question of the repayment of the relief advanced on loan. (3.) Tynemouth Labour Party, with resolutions expressing the opinion that the miners' debt to the guardians should be abolished during their term of office. (4.) Burradon Branch of the Northumberland Miners Mutual Confident Association urging that the existing arrangements for repayments should be modified in order that the scale of repayment should be based on net, and not on gross, earnings. The Committee proceeded to give careful consideration to the views expressed in this correspondence, and also the facts disclosed by the recent enquiry. The enquiries made of other Unions with reference to the methods of recovering relief advanced to miners during the coal trade dispute of 1926 disclosed the fact, as anticipated, that there is considerable variation in the methods adopted, but in respect of the Morpeth and Castle Ward Unions they further disclosed the significant fact that the deductions are made from net wages. Your Committee are aware that it has been hitherto thought to be impracticable and inequitable to attempt to base recovery on net wages on the ground that it would give rise to further grievances, as in the case of men occupying rented houses as compared with men living in colliery houses. Your Committee, however, appreciate that two serious grievances arise under the existing method: (1.) That the recovery is based on gross earnings which inflicts real hardship in cases where the 'off takes' are heavy, and (2.) that although the amount of the minimum deduction has been reduced to the nominal sum of 6*d.*, the deduction of even the smallest sum from wages of a man having a wife and family to keep on gross earnings of 30*s.* per week is indefensible. They therefore recommend that steps be taken to amend the existing scale of repayment to provide: (*a*) That repayment shall be made on the basis of net earnings; (*b*) that no deductions shall be made from the wages of any man whose net earnings for the week do not reach 2*l.*; and (*c*) that in order to preserve equality of treatment between men occupying colliery houses and others the words 'net earnings' shall be defined as meaning in the case of a man occupying a colliery house the amount of his net earnings as shown on his pay note, plus 5*s.* for rent." This report was considered at Board meetings on June 13 and July 11, and inasmuch as the resolution which is impugned was attempted to be moved at the former of these two meetings, and was moved and carried at the latter as an amendment to the report, this would seem to be a convenient moment for stating a few facts which may, or may not, have been present to the minds of the majority who passed the resolution, but which, nevertheless, must have been within their knowledge, and would appear not to be otherwise than relevant to the question involved in the amendment.

The figures I am about to state record the position on July 11, and would not be substantially different on June 13. I am taking them from exhibit "T.P. 8": "As I have already stated, the total number of miners to whose dependants relief was given was 9036, and the relief given amounted to 195,957*l.* 6*s.* 6*d.* In July, 1929, 727 miners had repaid their loans in full, amounting to 5267*l.* 18*s.* 1*d.* 119 had been excused, involving a loss of 2037*l.* 13*s.* 3*d.* 3188 were not paying owing to being out of work, sick, or on too low a rate of wages. Their indebtedness amounted to 59,541*l.* 2*s.* 11*d.* These figures account for 4034 men, and 66,846*l.* 14*s.* 3*d.*

Deducting these from the total number of men (9036), and the total relief (195,957*l.* 6*s.* 6*d.*), we get 5002 men, whose advances amounted to 129,110*l.* 12*s.* 3*d.* In July these 5002 men had already repaid 43,103*l.* 1*s.* 9*d.*, and were continuing regularly to reduce, by deduction from wages, the outstanding balance of 86,007*l.* 10*s.* 6*d.* So that in July, not only had 727 men paid 5267*l.* in full, but another 5002 had paid over 43,000*l.* out of 129,000*l.*, and were continuing to meet their liabilities in respect of the remaining 86,000*l.*

The first two pages of the bundle of documents marked No. 3 show the dates and amounts in, and by which, the 43,000*l.* odd was repaid, and it appears from Mr. Wilson's evidence (Third Day, p. 10), that in the months of August, September, and October, 1929, the amount was increased to 45,919*l.* 13*s.* 4*d.* by further remittances made by the collieries to the Guardians after the resolution was passed. It is said that the repayments tended to decrease, and the exhibit "T.P. 5" was put in to show that the weekly average of repayments had fallen. That may well be so, but I have no materials for judging how far this decrease may have been brought about by the successive reductions in the scale of repayment, and I cannot disregard the fact that the defendants, notwithstanding the alleged decrease, in preparing their budget before the passing of the resolution, took credit for an anticipated receipt of 6000*l.* in the coming half year from this source, a credit which would have relieved, pro tanto, the plaintiffs and other ratepayers, but which, on the passing of the resolution, had to be deleted. No less a sum than 1621*l.* 17*s.* 5*d.* was reported as having been received by way of repayment of relief by miners for the four weeks between June 13 and July 11, 1929. It does not follow that the whole amount had been paid during those four weeks, as the colliery companies did not always remit punctually, but the point is that the receipts showed that very substantial sums had, in fact, been paid right up to the date of the resolution. The Hartley Main Collieries was a large contributor. In July, 1929, they were employing 5472 men (Mr. Gibson's evidence, p. 46, Fourth Day), and of these

1514 were liable to repay relief (see exhibit "S.W. 1"), 741 of whom were receiving less than 2*l*. a week; 751 less than 3*l*., and 22 over 3*l*. This is fairly representative of the general state of things at the collieries (see Mr. Maddison's evidence, pp. 9 and 10, Sixth Day). On the scale then in force those of the 741 who were receiving 30*s*. and less, were not required to pay anything, those who were receiving over 30*s*. and less than 2*l*. paid 6*d*., the 751 were paying 2*s*., and the 22 3*s*. (see Fourth Day, p. 109). Wages did not fall in 1929, and the cost of living had fallen about eighteen points. Another point to be noted is that in July, 1929, there was owing to the Board for relief granted by way of loan to the dependants of men other than those employed in or about the collieries, a sum of between 135,000*l*. and 140,000*l*. When the coal dispute came to an end, and the regulations adopted in May, 1926, were cancelled by the Board on December 30, 1926 (see p. 25 of bundle of documents No. 1), the Board started giving relief otherwise than by way of loan, and continued to do so until April, 1927, when they reverted to relief by way of loan to transport and other workers who had been thrown out of work in consequence of the coal dispute, and between April, 1927, and July, 1929, the amount so advanced and outstanding had reached the total I have mentioned. The resolution which has given rise to these proceedings, as I mentioned earlier in this judgment, has been treated as applying only to loans due from men employed in and about the collieries, but, in terms, it is wide enough to include the loans contracted between April, 1927, and July, 1929. As Sir Tom Percival admits, there does not appear any logical distinction between the debtors in the two classes, and if one class is entitled to have the debts of all members of the class cancelled en bloc, he cannot suggest any valid reason for not treating the other class in the same way. But the point is that the existence of these further debts—of which admittedly a large proportion can never be recovered—affords a strong ground for objecting to the relief of any of the debtors in either class who are able, and still more those who are able and willing to pay. And in this connection it cannot be lost sight of that the constant and urgent complaints made by the relators and other ratepayers had from time to time been met with the statement that the relief had been afforded by way of loan, and that the loans were in fact being repaid. It was in these circumstances that the report of the Special Committee came up for consideration by the Board on June 13. The Board is composed of sixty-six members—they include a minority of members belonging to the Labour Party, and as a general rule, the latter act together in accordance with the recommendations of some of their party, who meet a couple of hours before the Board meeting to consider the business on the agenda for the day. Some of the Labour members had from the first disapproved of the relief to the miners being made on loan, and as appears from the evidence, the party was committed to the support of Mr. Mullarkey's motion before the meeting of July 11, if not before that of June 13. On the 13th the report of the Special Committee—which was not a unanimous one—was presented, read and discussed, and to a resolution that it should be approved and adopted, an amendment, moved and seconded by members of the Labour Party (Mr. Mullarkey and Mrs. Wallace) was carried, after another amendment to postpone the consideration of the report to the next meeting of the Board had been rejected. The amendment was in the following terms: "That so much of the minutes of the proceedings of the Special Committee (repayment of relief by miners) as relates to the repayment by miners of relief received by their dependants during the coal trade dispute, 1926, be not confirmed, that in the opinion of this Board the time has arrived when the whole of the outstanding debt from these men should be cancelled and that notice of motion to give effect to this proposal be submitted to the Board at the next meeting." Before this amendment had been moved, Mr. Mullarkey had attempted to move a resolution there and then to cancel the outstanding debt, but the clerk, having advised that such a motion would be out of order, the Chairman so ruled, and after the passing of the above amendment Mr. Mullarkey gave notice that at the next meeting of the Board he would move a resolution in the following terms: "That as from the 15th July next, the balance of the loans owing by the miners and other workmen in respect of relief received by their dependents during the coal trade dispute, 1926, be excused and cancelled, and that all minutes of proceedings of meetings of the Guardians as in any way conflict with this decision be and they are hereby rescinded." Accordingly, on July 15, at the next Board meeting, Mr. Mullarkey moved and Mrs. Wallace seconded a resolution in the above terms, and after a discussion variously estimated to have lasted from fifteen minutes to half an hour, the motion was carried by a substantial majority. An attempt to rescind it at the next meeting of the Board on August 8 failed, and the writ in this action was served on the same day.

In the course of the discussion on the 11th a letter was read from Mr. Magrath, the district auditor, dated June 25, wherein he stated that he had noticed in the Press a statement that the Guardians were considering the proposal to excuse all relief which had been granted on loan to able-bodied unemployed persons, and that he had previously held in another case that the excusal of all relief granted on loan did not come within the power of a Board of Guardians, and that such a resolution was invalid and that counsel's opinion had confirmed his finding. The reading of this letter appears to have raised hopes in the minds of those who were opposing the motion that the majority would hesitate before disregarding it, but those supporting the motion appear to have attached to the communication the value usually assigned to gratuitous advice and ignored it.

I have heard evidence on both sides as to what took place at this meeting from Guardians and officers who were present, and a report from a local newspaper was read disclosing certain interchanges of personalities—not dissimilar from those of increasing frequency in a more august assemblage—on all of which the witnesses were discreetly silent or charitably oblivious. Half an hour soon slips away in a fusillade of uncomplimentary pleasantries, and I am quite content to assume that not less than that period was devoted in part to these diversions and in part to the business in hand.

But I do not pause to examine the evidence, and I will not attempt to express an opinion, whether the tactics of the Labour group (I am using their own expression) or their votes were influenced by the communication received from the Tynemouth Labour Party, or the knowledge that the days of the Board were numbered, because it is abundantly clear the one and only point of view from which the question of cancelling the debts was ever approached or discussed was the relief of the miners generally. No regard was had to the fact that 5729 of the 9036 borrowers had repaid in full or in part, and that the 5002 who had repaid in part were regularly continuing their instalments, that moneys to the amount of close upon 300*l.* a week were coming in to the relief of the ratepayers, that practically there had never been any request made for cancellation of the debts, or that the scale of repayment had been temporarily so reduced as to suspend all payments on the part of the lower paid men. No one seems to have appreciated, or if any did so they ignored the facts, that further relief, if really necessary, could always be given by fresh lowering of the scale of repayments, and that the logical sequence of what they were doing for the miners would be the like release of the debts owing by the transport workers and others.

From first to last, it seems never to have been appreciated that in respect of the property represented by the outstanding debts and the collection of the same, the position of the Guardians in relation to the ratepayers was of a fiduciary character, and they certainly could not make a present of it to the borrowers at the expense of the ratepayers simply, as Mr. Maddison puts it, "because of the distress that prevailed amongst the miners and their families," or, as Mrs. Wallace says, "because of the conditions under which the miners' wives and children have got to live"; or, as Mr. Mullarkey adds, "because of the destitution and poverty amongst the miners and the distress in the coal-fields of Northumberland." There is no evidence from which

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I can deduce that these conditions of distress were present amongst the 5002 who were still repaying, and no attempt has been made to prove that such is the case.

My conclusion, on the whole matter, is this, that assuming —contrary to the opinion I have already expressed—that the Board had a discretionary power to cancel all the debts, they have not exercised the discretion reasonably, in that they have considered solely the interest of the debtors and, without any enquiry or investigation into the ability of all or any of the debtors to repay, and surely, in the absence of evidence to the contrary, the fact that they do repay is sufficient proof of their ability so to do, have purported, in total disregard of their duties towards the ratepayers, to release all the indebtedness to the loss and damage of the ratepayers.

These latter have, in my opinion, good grounds for asserting that the Board has failed to act reasonably. The moneys outstanding in the hands of the debtors are moneys contributed by the ratepayers, and as Lord Atkinson says in his speech in *Roberts* v. *Hopwood* (1): "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly business-like manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body."

The defendants have, in my opinion, acted in flagrant violation of that rule. They have left undone those things which they ought to have done, with the result that what they have done is invalid and of no effect.

On both grounds upon which they are claimed, the plaintiffs are entitled to the declaration and the two injunctions asked, and the defendants must pay the costs of the action, so far as they have not already been dealt with.

Solicitors: *Torr & Co., for Stanley Wilson, Town Clerk, Tynemouth; Williamson, Hill & Co., for Whitehorn & Dodds, North Shields.*

H. L. L.

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(1) [1925] A. C. 578, 595.

PYTRAM, LIMITED *v.* MODELS (LEICESTER), LIMITED.

CLAUSON J.

1930

March 14.

[1929. P. 1637.]

Design—Copyright—Design capable of being registered under Patents and Designs Act, 1907—*Artistic Work—Works of Sculpture—Casts and Models—Design applied to Article by Industrial Process—Article (as respects Designs)—Wolf-Cub's Head moulded in Papier-Mâché—Sculpture Copyright Act,* 1814 (54 *Geo.* 3, *c.* 56)—*Patents and Designs Act,* 1907 (7 *Edw.* 7, *c.* 29), *ss.* 49, 53, 93—*Patents and Designs Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 80), *s.* 19—*Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 18, 22, *sub-s.* 1; *s.* 35, *sub-s.* 1; *s.* 36 *and Second Schedule.*

Apart from s. 22 of the Copyright Act, 1911, a model of a wolf-cub's head produced from a mould in papier-mâché and intended to be displayed as their totem on the tops of poles by the Boy Scouts Association, is an artistic work in which copyright would subsist under that Act: see s. 1, sub-s. 1; s. 35, sub-s. 1.

But, as the model consisted of "features of shape, configuration, pattern, or ornament applied to any article" of manufacture or artificial substance by an industrial process, and was therefore a design within the definition of s. 93 of the Patents and Designs Act, 1907, as amended by s. 19 of the Patents and Designs Act, 1919, and consequently was capable of being registered under the Act of 1907 and, further, was not a design which was "not used or intended to be used as a model or pattern to be multiplied by any industrial process," it was by s. 22 of the Copyright Act, 1911, excluded from the operation of that Act and not the subject of copyright thereunder.

In an action by the plaintiffs for infringement of copyright which they claimed in the model, against the defendants, who admittedly had copied and reproduced the model:—

Held, that, for the reasons stated above, the plaintiffs had no copyright in the model under the Copyright Act, 1911, and the design not having been registered as a design under the Patents and Designs Act, 1907, the action failed.

Semble, if the plaintiffs had had copyright in the model, the defendants could not successfully plead, under s. 8 of the Copyright Act, 1911, that they had no reasonable ground for suspecting the subsistence of copyright in the model owing to the absence of registration marks under the Patents and Designs Act, 1907, under which they alleged that in their view of the law the model was capable of registration, since, relying upon that view, they abstained from making any inquiries whether copyright in the model was claimed.

WITNESS ACTION.

The plaintiff company carried on business as modellers and sculptors at New Malden in the county of Surrey. It appeared that in the year 1927, the Boy Scouts Association were displaying as their totem attached to the tops of poles figure-heads made out of three-ply wood which had a rough resemblance to a wolf-cub's head; and, being minded to have something which better resembled a real wolf-cub's head, the Association gave an order to the plaintiff company to produce for them a model of a wolf-cub's head. The plaintiffs thereupon proceeded by their servants to produce a model of the head so designed with a hole in it as to be fixable to a pole. Evidence was given at the trial that the process of modelling was as follows: in the first place the head is fashioned by hand in clay: then, from that clay model there is taken a waste mould and the clay is removed. The waste mould is then filled with plaster of Paris and when the plaster is set, the waste mould is cut away. If the plaster replica proves satisfactory, a permanent mould is taken from it and, after that, papier-mâché models are made from it. The first model was criticized and slightly altered; but ultimately, a model was accepted and a large number of poles together with models of the wolf-cub's head composed of papier-mâché attachable to the poles were supplied to the Association.

The defendants, having through their manager received an order from certain customers of theirs to copy and reproduce a model of a wolf-cub's head which was sent to them for that purpose and which was, in fact, one of the plaintiffs' own models, proceeded, accordingly, to carry out the order and produced and supplied to those customers a number of replicas of the plaintiffs' model.

On July 26, 1929, it came to the notice of the plaintiffs that the defendants were offering for sale a model which was identical with the plaintiffs' model; and, accordingly, they brought this action against the defendants in which they claimed to have copyright in an original model—namely, the wolf-cub's head and charged the defendants with infringement of their copyright by reproducing in a material form and manufacturing and selling models representing the same cub's head and claimed an injunction to restrain the defendants from infringing the plaintiffs' copyright in the model, damages and delivery up of all infringing copies and moulds.

The defendants denied that the plaintiffs had copyright in the model or that copyright subsisted therein and pleaded that, if the model was an original work, which they did not admit, it was a design capable of being registered under the Patents and Designs Act, 1907, and was used or intended to be used as a model or pattern to be multiplied by an industrial process, and relied on s. 22 of the Copyright Act, 1911. The defendants further pleaded that, if the plaintiffs had copyright in the model, they were not aware nor had they any reasonable ground for suspecting that copyright subsisted in the model and claimed the protection of s. 8 of the Copyright Act, 1911.

Evidence was given at the trial by the manager of the defendant company that in his view the model which was sent to him for reproduction was capable of being and ought to have been registered as a design under the Patents and Designs Act, 1907, and that it was not a subject-matter in which anybody could have copyright; further, that he could discover no marks on the model to indicate registration under that Act, and that, relying upon that view of the law which he formed and the absence of marks and the good reputation of the firm who sent the model, he abstained from making inquiries as to the ownership of copyright in the model and proceeded to have copies of the same made for the said firm.

Mr. Triggs, as an expert on the registration of designs who was called on behalf of the defendants to assist the Court, said that there was no difficulty in the way of effecting the registration under the Patents and Designs Acts, 1907 and 1919, of such a model as the plaintiffs.' Counsel for the plaintiffs objected to the admission of the evidence and claimed that whatever the result of the action, the costs of calling Mr. Triggs ought to be borne by the defendants, and pointed out that in *Con Planck, Ld.* v. *Kolynos Incorporated* (1) the costs of calling such a witness for the assistance of the Court

(1) [1925] 2 K. B. 804.

were included in the costs of the defendants which the plaintiffs had to pay, because no objection in that case had been raised by the plaintiffs to the witness being called.

G. H. Lloyd Jacob for the plaintiffs. The plaintiffs have copyright in the model. Before the Copyright Act, 1911, protection was given to works of sculpture by the Sculpture Copyright Act, 1814. By s. 93 of the Patents and Designs Act, 1907, a design for a sculpture protected by the Act of 1814 was excluded from the definition of "design." The Copyright Act, 1911, repealed the Act of 1814 and substituted for the protection afforded by the repealed Act copyright protection for the plaintiffs' "artistic work" which included the model in question: see s. 35, sub-s. 1, of the Copyright Act, 1911. So far, the plaintiffs had the sole right of producing or reproducing the model: see s. 1, sub-s. 2. By the Patents and Designs Act, 1919, a new definition of "design" was substituted which contains no express exclusion of works of sculpture. The question is whether the model in question comes within that new definition of "design" and is capable of registration under the Act of 1907 and exempted from the operation of the Copyright Act, 1911, by s. 22 of that Act. In the case of this model, its features of shape and configuration are not applied to an article or substance by an industrial process, within the definition of design in s. 19 of the Act of 1919. Application to an article means application to an article which has some independent existence and does not exist merely as the vehicle for the expression of the artistic conception contained in a drawing. If the article is entirely subservient and incidental to the work of art which is created, it is not an article to which the design of the work can be said to be applied within the meaning of s. 19 of the amending Act of 1919. The article in such a case is part of the raw material which goes towards forming the artistic work and is merged in it. Articles which can be registered under the Act of 1907 are articles which have an existence apart from a particular design. The whole conception of a work of art is the reverse of that. It is the physical embodiment of the artistic idea; the tangible thing so created which, apart from the artistic idea, would not exist.

[He referred to *Con Planck, Ld.* v. *Kolynos Incorporated* (1) and *Masson, Seeley & Co.* v. *Embosotype Manufacturing Co.* (2)]

Geoffrey Tookey for the defendants. The plaintiffs' model has the protection given to it by the Copyright Act, 1911, unless it is excluded from that protection by s. 22 of that Act. It is an artistic work within s. 1 of that Act: see s. 35, and the plaintiffs' title is not disputed. If their model is within the Act, the real question is whether the model was capable of being registered under the Patents and Designs Act, 1907. It was capable of being so registered, because it comes within the definition of "design": see s. 93 of the Act of 1907, as amended by s. 19 of the Patents and Designs Act, 1919. It has features of shape applied to an article of artificial substance and is not within the exception mentioned in s. 22 of the Copyright Act, 1911, because it is a design which was intended to be used as a model to be multiplied by an industrial process. If the Court should hold that the plaintiffs have copyright in the model, then the evidence shows that the defendants had no reasonable ground for suspecting that the model was the subject of copyright and are protected by s. 8 of the Copyright Act, 1911.

CLAUSON J. [after stating the facts above set forth, continued as follows:] If the plaintiff company have, as a matter of law, copyright under the Copyright Act in the model wolf-cub's head, their copyright has been infringed by the defendants. There is no question as to their title to the copyright, seeing that the model was made by the plaintiffs' own servants working for them, and there is also no question that the copyright has been infringed by the defendants, the plaintiffs' model having been, in fact, deliberately copied.

It is suggested that the defendants have brought themselves within s. 8 of the Copyright Act, 1911, and that they have

(1) [1925] 2 K. B. 804, 813.

(2) (1924) 41 R. P. C. 160.

proved that at the date of the infringement they were not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

It is true—I am satisfied of this on the evidence—that the defendants by their directors took the view that copyright could not subsist in a model of this kind, unless the model was registered under the Patents and Designs Act, 1907, with the consequence that it would have to bear the usual registration marks; and they took the view that, having regard to the absence of those registration marks, they could treat the model as one which they were safe in copying. But assuming that a model of this kind made in the circumstances in which the plaintiffs made their model, carries with it copyright under the Copyright Act, 1911, my view is that the defendants had reasonable ground to suspect that copyright subsisted in the work. The model was not theirs and they made no inquiry whose the model was, and specifically abstained from making any inquiry, because of the view of the law which they took. In these circumstances the defendants have, in my judgment, failed to establish that they had no reasonable ground for suspecting that copyright subsisted. Accordingly, assuming the Copyright Act, 1911, to apply to the plaintiffs' model, the action would necessarily succeed: the plaintiffs would be entitled to the usual rights which flow from infringement of copyright and the defendants would not be protected against an inquiry as to damages by s. 8 of the Copyright Act, 1911.

That brings me to the real point in the case. Does copyright subsist under the Copyright Act, 1911, in this model of the plaintiffs? In the year 1907 the state of the law was that under the Sculpture Copyright Act, 1814, copyright could, under certain conditions, be claimed in a model of this character. In the year 1907, the Patents and Designs Act, 1907, provided that the Comptroller might, on the application of the proprietor of a new or original design, register the design under the Act, and that a design so registered would give to the registered proprietor copyright by reason of the provisions of s. 53 of the same Act; and a design which could be so registered is defined in this way: "Any design (not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814) applicable to any article, whether the design is applicable for the pattern or for the shape or configuration"; "article" being defined as meaning: "any article of manufacture and any substance artificial or natural, or partly artificial and partly natural." Accordingly, when the Act of 1907 became law the position was that, if a model was (as I conceive this model would have been) within the protection of the Act of 1814, it apparently could not be registered under the Act of 1907.

Now in 1911, on the day on which the Copyright Act, 1911, came into force, the Sculpture Copyright Act, 1814, was repealed; and accordingly, as from the moment of the Copyright Act, 1911, coming into force, any design within the definition that I have spoken of in the Patents and Designs Act, 1907, could be registered and, if so registered, would carry copyright under the Act, even if it was a design which, had the Act of 1814 been still in existence, would have been protected by that Act. The Act of 1814 having disappeared, there could no longer be any design protected by that Act; and the exception could be treated as struck out of the definition of "design" in the Patents and Designs Act, 1907. The Copyright Act, 1911, provided that without registration copyright should subsist for the term mentioned in that Act in every original "artistic work," subject as in the Act mentioned—I omit various immaterial provisoes—that is to say, as I find on turning to the definition clause, should subsist in, among other kinds of artistic work, works of "sculpture and artistic craftsmanship"; and "work of sculpture" includes casts and models; and, accordingly, there was copyright under that Act in casts and models. So far as I have gone, under that Act there would be copyright in the model with which I am concerned in this action. But there is an excepting section in the Act of 1911; s. 22 is as follows: "This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process."

Now let me take the case, immediately after the Act of 1911 comes into force, of an ordinary piece of sculpture, sculptured by a sculptor according to the usual methods used by sculptors, say a portrait bust, or something of that kind. As I read the Act, the copyright in that article of sculpture is given to the author of it in the first instance, but that copyright is taken away by the first part of s. 22, if (as would at all events in many cases, if not all, be the fact) the sculpture comes within the term "design" as defined in the Act of 1907, and is, accordingly, capable of being registered under that Act, so that, although in the first instance, the sculptor is prima facie given copyright under the Act of 1911, the first part of s. 22 takes that copyright away, if his artistic work is a design which is capable of being registered under the Patents and Designs Act of 1907; but by the following words in the same section, s. 22, the work is replaced in the category of works carrying copyright under the Copyright Act, 1911, if it is a design which is "not used or intended to be used as a model or pattern to be multiplied by any industrial process"—words which, of course, would apply in the case of what I may call an ordinary piece of artistic sculpture.

That was the position in 1911 and from that date to 1919. In 1919 the definition of "design" in the Act of 1907 was repealed and a new definition was substituted. The first material point to observe—the most material, having regard to the argument which was addressed to me—in the new definition of "design" is that the words which except a design within the protection of the Sculpture Copyright Act, 1814, have disappeared from the definition. But it was necessary that they should disappear, for the words had become meaningless from the moment that by the Copyright Act, 1911, the Sculpture Copyright Act of 1814 had been repealed; and the definition of "design" in the Act of 1907, as amended in 1919, now reads as follows: "'Design'" means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device"; and the expression "article" means (as respects designs) "any article of manufacture and any substance artificial or natural, or partly artificial and partly natural."

Now it appears to me that the model with which I am concerned in this case comes within the definition of "design" which I have read, and accordingly is capable of being registered under the Patents and Designs Acts, 1907 and 1919. That which is registered is and must necessarily be "the features of shape, configuration, pattern, or ornament applied" in this particular model to a substance by an industrial process; and I see no escape from the position that this model was a design capable of being registered under the Act.

The result of that is that, so far, no copyright under the Act of 1911 can be predicated to exist of this model. There is still, however, the exception in the latter part of s. 22 to be dealt with—namely, "Designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process." It is admitted—and if it had not been admitted, from the facts of the case as I have stated them, it is clear—that this particular design was in fact used and intended to be used as a model to be multiplied by an industrial process. The whole point in the preparation of this model was to enable the plaintiffs to supply totem poles in large quantities. It follows that the plaintiffs cannot sustain this action, because the copyright which they are seeking to protect is one which they can acquire under s. 53 of the Patents and Designs Act, 1907, only by registration under that part of the Act which relates to Designs, and that registration has not been effected. The plaintiffs have mistaken the legal position. Models of this

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character can only be protected under the Patents and Designs Acts, 1907 and 1919, by registration as "designs," and no copyright can be claimed in them under the Copyright Act, 1911.

The consequence is that in the circumstances the plaintiffs have no legal remedy, since they have not registered that which they seek to protect under the Patents and Designs Acts of 1907 and 1919. The action therefore must be dismissed, and the plaintiffs must pay to the defendants their costs of the action with the exception of the costs of and occasioned by Mr. Triggs being called as a witness.

Solicitors: *Simmons & Simmons; Benjamin Wilkinson, for Parsons, Son & Skillington, Leicester.*

H. C. H.

BENNETT J.
1930
March 19.

In re BUXTON.

BUXTON *v.* BUXTON.

[1930. B. 133.]

Will—Contingent specific legacy—Shares in company—Capitalised profits—Accretions—Right to accretions before happening of contingency.

A testator bequeathed to his son and grandson on the death of his wife the shares belonging to him at his death in a certain company. Between the death of the testator and the subsequent death of his wife each of the 460 shares of the value of 35*l.* each which belonged to him at the date of his death became, as the result of the capitalisation of a portion of the reserve fund of the company, consolidated with a new share of the value of 15*l.* into a share of the value of 50*l.* The testator's estate, as the result of the capitalisation, also became entitled, in consequence of his holding of 460 ordinary shares, to 920 preferred ordinary shares of 10*l.* each.

Held, (1.) following *Smell* v. *Dee* (1707) 2 Salk. 415, that the gifts were contingent, and (2.) that the original 460 shares together with the accretions became, on the death of the testator's wife, the property of the specific legatees.

Dictum of Fry J. in *Guthrie* v. *Walrond* (1883) 22 Ch. D. 573, 578, not followed.

ADJOURNED SUMMONS.

The testator, Edward North Buxton, died on January 9, 1924, having made his will on February 24, 1921. At the date of his death he was possessed of 460 fully paid ordinary shares of 35*l.* each in Truman, Hanbury & Buxton, Ld., which formed part of the total issued capital of 12,150 ordinary shares of 35*l.* each.

By clause 9 of his will the testator provided as follows: "I give to my son the said Anthony Buxton on the death of my said wife but not before such number of my ordinary shares in Truman, Hanbury & Buxton, Ld., as shall amount to one equal third part of my total holding of ordinary shares in that company at the time of my death and I give to my grandson the said Edward North Buxton on the death of my said wife but not before such number of my ordinary shares in Truman, Hanbury & Buxton, Ld., as shall amount to the remaining two equal third parts of my total holding of ordinary shares in that company at the time of my death." Then, after making provision for the conversion of his estate and for payment of his funeral and testamentary expenses, the testator provided for the investment of his residuary trust moneys and by clause 18 directed his trustees to stand possessed of those investments (thereinafter referred to as "the trust fund") upon trust to pay out of the income or capital thereof any sums thereinbefore directed to be paid thereout and subject thereto to pay the surplus income to his children in manner therein mentioned during the lifetime of his wife and after her death to stand possessed of the capital of the trust fund upon trust for his said children absolutely in the proportions therein provided.

After the testator's death and in the lifetime of his wife, on January 5, 1928, the company passed resolutions increasing their capital by the creation of 24,300 preferred ordinary shares of 10*l.* each and 12,150 new ordinary shares of 15*l.* each.

The latter resolutions were in the following terms:—

"(1.) That the sum of 425,250*l.* part of the company's reserve fund be capitalised and be appropriated as capital to the holders of the ordinary shares in the company registered as such at the date of the passing of this resolution in proportion to the ordinary shares then held by them respectively and that such sum be applied on behalf of the ordinary shareholders aforesaid in paying up in full the 24,300 new preferred ordinary shares in the company of 10*l.* each and the 12,150 new ordinary shares in the company of 15*l.* each and that such shares be appropriated and distributed credited as fully paid up amongst such holders of ordinary shares in the proportion of two such preferred ordinary shares of 10*l.* each and one such ordinary share of 15*l.* for every existing ordinary share of 35*l.* then held by such respective holders and that the allotment and issue of such new preferred ordinary shares of 10*l.* each and ordinary shares of 15*l.* each be accepted by such holders as in full satisfaction of all their rights and interests in the said capitalised sum, and that the directors be and they are hereby authorised to enter on behalf of the company into an agreement with such holders of ordinary shares or their duly authorised agent for the allotment to and acceptance by them of such new preferred ordinary and ordinary shares as aforesaid: (2.) That on such new ordinary shares of 15*l.* each being so allotted and issued as aforesaid the same be consolidated with the existing ordinary shares of 35*l.* each in such manner that each such new ordinary share of 15*l.* be consolidated with one existing ordinary share of 35*l.* into one ordinary share of 50*l.*"

As a result of these resolutions 920 preferred ordinary shares of 10*l.* each, fully paid, and 460 ordinary shares of 15*l.* each, fully paid, were allotted to the trustees of the testator's will. The latter were consolidated with the shares held at the time of the testator's death, with the result that the trustees then held 460 ordinary shares of 50*l.* each and 920 preferred ordinary shares of 10*l.* each.

The testator's widow died on October 26, 1929.

This summons was taken out by one of the surviving executors and trustees of the testator's will (each of whom also claimed to be interested as a specific legatee in the said ordinary shares and as a residuary legatee under the will) for the determination by the Court of the question whether they, as specific legatees under clause 9 of the testator's will of the testator's ordinary shares in the company in the proportions of one-third and two-thirds respectively, were entitled in the same proportions to the benefit of the new preferred ordinary shares and ordinary shares in that company which by the above mentioned resolutions were appropriated to the then holders of ordinary shares in the company by way of capitalisation of reserves (and as to the said new ordinary shares consolidated with the then existing ordinary shares into ordinary shares of 50*l.* each), or whether such new preferred ordinary and ordinary shares fell into and formed part of the testator's residuary estate.

Cecil Turner for the plaintiff.

Stamp for one of the specific legatees. The effect of giving the shares to the specific legatees on the death of the wife leaves the income derived from them during the wife's life to be disposed of as income of that part of the estate which is undisposed of. The capitalised shares are capital and the bonus shares are capital. The effect of the issue of the bonus shares is merely to alter the form of the investment. The shares are in residue during the widow's life only in so far as the income derived from them is in residue. The gifts are vested reversionary gifts of corpus.

[He referred to *In re Speir.* (1)]

F. H. L. Errington for the residuary legatees. These shares remained contingent until the death of the widow. The case is covered by *Smell* v. *Dee.* (2) That case has been treated as quite clear law. A contingent gift does not carry income and accretions: see *Guthrie* v. *Walrond.* (3)

[He also referred to *Bruce* v. *Charlton* (4); *In re Cartledge* (5); and to Jarman on Wills, 7th ed., vol. ii., p. 1373, and Theobald on Wills, 8th ed., p. 656.]

Stamp in reply. Futurity is not imposed on these gifts as the substance of the gifts is defined at the testator's death. The shares are identified at the date of the testator's death.

(1) [1924] 1 Ch. 359.
(2) 2 Salk. 415.
(3) 22 Ch. D. 573, 578.
(4) (1842) 13 Sim. 65.
(5) (1861) 29 Beav. 583.

The specific legatees have a contingent interest in any further shares which may come afterwards. It cannot be said that the specific legatees have no interest in them. If the trustees were intending to misappropriate the shares the legatees could move for an injunction.

BENNETT J. This summons raises the question whether the accretions to the capital of certain shares in a company belong to certain specific legatees under the will of a testator or fall into his residuary estate. [After reading the question as stated in the summons and after considering the arguments with regard to the question whether the gifts were vested in the specific legatees on the death of the testator or were contingent on the death of the testator's widow, and finding as a matter of construction that the point was covered by *Smell* v. *Dee* (1), and that the gifts were contingent, his Lordship continued :] Then Mr. Errington argues that, the gifts being contingent, any accretion to the legacies before the happening of the contingency falls into the residue of the testator's estate, and he bases that argument on the observations of Fry J. in *Guthrie* v. *Walrond*. (2) In that case the learned judge said in his judgment : "I think the law is plain that when a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to his next of kin, as the case may be."

It seems to me that the language used by the learned judge was wider than necessary for the purpose of deciding the point which arose before him. It appears that the only question was as to the destination of the income of the specific legacy during the period before the contingency happened. It seems that the learned judge had not to consider and, therefore, did not decide any question with reference to accretions to the capital of a contingent specific legacy, and in my judgment the judgment of Fry J. is not a decision in favour of Mr. Errington's contention.

(1) 2 Salk. 415.

(2) 22 Ch. D. 573, 578.

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Then Mr. Stamp contends that, assuming the legacy to be contingent, when the contingency happens and the legatee becomes entitled to the shares, everything of a capital nature which has accrued to those shares goes to the legatee of those shares, there being no gift of capital accretions to any one else ; and that there is no reason why, when the contingency happens, the ordinary rule with regard to accretions to capital should not be applicable. It is difficult to see what answer there is to that contention.

There appears to be no reason why there should be a difference between the rule which applies to accretions of a capital nature to a contingent legacy and that which is applicable in the case of capital accretions to a vested legacy, and my answer to the question raised by the summons is that the accretions which resulted from the capitalisation go to the specific legatees under clause 9 of the will in the proportions of one-third to two-thirds.

Solicitors : *Dawes & Sons ; Collyer-Bristow & Co.*

J. L. D.

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March 25, 26.

In re MILLS.

MILLS *v.* LAWRENCE.

[1929. M. 2125.]

Power—Release—Testamentary Power of Appointment to any Member of a Class—Selection of Object specially qualified in Opinion of Donee—Trust for Donee in Default of Appointment—Power Appendant or Appurtenant—Validity of Release—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 155.

A testator by his will directed the income of his net residuary estate to be accumulated for a period of twenty-one years from his death, and subject to certain trusts in favour of an infant grandson and his issue which failed owing to the death of the grandson unmarried, declared that the trust fund and all statutory accumulations of income were to be held upon such trusts for the benefit of all or any one of the children and remoter issue of the testator's father, who in the opinion of the testator's brother, one of the two trustees of the will, should evidence an ability and desire to maintain the family fortune by replacing the sums of which it had been depleted by death duties and other taxation, as the testator's brother should by any deed revocable or irrevocable appoint, and in default of such appointment in trust for such brother absolutely:—

Held, that the power was a power appendant or appurtenant and not a power coupled with a trust or a duty in the nature of a trust, and accordingly that it could be validly released by the donee.

Weller v. *Ker* (1866) L. R. 1 H. L. Sc. 11; *In re Eyre* (1883) 49 L. T. 259; and *Saul* v. *Pattinson* (1886) 55 L. J. (Ch.) 831; 34 W. R. 561 distinguished.

Decision of Eve J. ante p. 440 reversed.

Appeal from a decision of Eve J. (ante p. 440).

By his will dated May 24, 1922, the Hon. Algernon Henry Mills appointed his brother, the Hon. Egremont John Mills, the plaintiff, and his brother-in-law, General the Hon. Sir Herbert Alexander Lawrence, to be executors and trustees thereof, and after making various specific bequests and bequeathing certain annuities, and a reversionary legacy to a grand-daughter, devised and bequeathed all his real and personal estate, not otherwise disposed of, unto his trustees upon trust for sale and conversion, and after payment thereout of funeral and testamentary expenses, death duties and debts and payment or provision for legacies and annuities, to invest the residue and to hold the investments and the income thereof upon trust to accumulate the annual income by way of compound interest for a period of twenty-one years, and after the expiration of that period to apply the income for the maintenance, support, or benefit of his grandson, Henry Algernon Seymour Mills, or his wife and issue for the time being as the trustees should in their absolute discretion think fit, and after the death of his grandson and subject to the trust for accumulation the trust fund and the income thereof were to be held upon certain trusts for the issue of the grandson (which failed). And clause 19 of the will directed that subject to the above trusts and powers the trust fund and all statutory accumulations of income were to be held upon such trusts for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of the testator's father, "who in the opinion of my said brother evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it has been despoiled by death duties and other taxation, as my brother the said Egremont John Mills shall by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for my said brother absolutely."

The testator died on October 21, 1922, and probate of his will was granted to the executors, the plaintiff, and the defendant, Lawrence, on January 8, 1923.

The testator's father, the first Lord Hillingdon, had ten children, of whom four were still living at the date of the testator's death. There were also several grandchildren and great-grandchildren then living. The testator's grandson, Henry Algernon Seymour Mills, died on April 1, 1928, an infant, and without having been married.

By an appointment dated June 13, 1928, the plaintiff appointed that after the determination of the trust for accumulation and after the death of the survivor of himself and his wife, the trustees should raise 15,000*l.* out of the trust fund for two nieces of the testator, Sylvia Caroline Watts Russell and Elizabeth Barbara Abel Smith, and subject thereto that the trust fund should be held in trust for such of them, Algernon Victor Mills and Geoffrey Edward Mills, nephews of the testator, as attained the age of twenty-one years and should then be living. The plaintiff thereby retained power to revoke or vary this appointment, and by a deed of revocation dated June 18, 1929, he revoked the appointment and released the trust fund from the power to the intent that the power should be absolutely extinguished.

The summons was taken out to determine the questions: (1.) whether having regard to the release of the power of appointment the plaintiff was absolutely entitled to the property; (2.) if the release did not vest the property in the plaintiff, whether the plaintiff could validly appoint in favour of himself the whole or any part of the property; and (3.) if the release had not the aforesaid effect whether the plaintiff was under any obligation to exercise revocably or irrevocably the power of appointment.

Eve J. held that although the power of appointment was not a trust inasmuch as there was no one who could enforce the execution of it, it was a power coupled with a duty in the nature of a trust and could not be released. The testator had made his intentions manifest. The income of the trust fund was to be accumulated for the full statutory period and the testator obviously hoped that some member of the class might be found to prolong the process of accretion. It was impossible to believe that he ever intended or contemplated that the plaintiff could at any time release the power and constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation. In the circumstances he (his Lordship) could not accede to the view that the plaintiff was free to divest himself of the power or to do anything which would preclude him from exercising it thereafter. This conclusion was supported by *Weller* v. *Ker* (1); *Saul* v. *Pattinson* (2); and *In re Eyre.* (3) He must therefore hold that there was no power in the plaintiff to release the power of appointment or to appoint to himself.

(1) L. R. 1 H. L. Sc. 11.

(2) 55 L. J. (Ch.) 831; 34 W. R. 561.

(3) 49 L. T. 259.

The plaintiff appealed. The appeal was heard on March 25, 26, 1930.

F. Morton K.C. and *Cleveland-Stevens K.C.* for the appellant. The intention of the testator was that until the plaintiff chose to exercise the power he should be the sole beneficiary. It is not a power coupled with a duty of the nature of a trust. The fact that the donee of the power takes in default of the exercise of the power removes the case from the category of powers in the nature of a trust. The Conveyancing Act, 1881, s. 52 (which is re-enacted by ss. 155 and 160 of the Law of Property Act, 1925), enabled a power to be released whether coupled with an interest or not. Powers are defined by Jessel M.R. in *In re D'Angibau* (1) as (1.) collateral; (2.) in gross; and (3.) appendant or appurtenant. Before the Conveyancing Act, 1881, a power simply collateral could not be released. A power appendant or appurtenant always could; and the power in this case is such a power: see Sugden on Powers, 8th ed., pp. 49, 88. Since the coming into force of the Conveyancing Act every power can be released, unless it is a power coupled with a trust or duty. Powers in the nature of trusts are discussed in Farwell on Powers, 3rd ed., ch. XII., and they bear no resemblance to the power in the present case. There is here no trust which any cestui que trust could enforce. The ordinary power of appointment among children or issue given to a tenant for life is not a power coupled with a duty and can be released: *In re Radcliffe.* (2) The first essential that a power should be construed as a power coupled with a trust is that the words used show that an imperative trust is created. Here Eve J. has held that there is not an imperative trust, but without that element a power cannot be treated as coupled with a trust. In the three cases relied on by Eve J. in his judgment, namely *Weller* v. *Ker* (3); *In re Eyre* (4); and *Saul* v. *Pattinson* (5), the powers were conferred on trustees, and were held to be a part of their trust which could

(1) (1880) 15 Ch. D. 228, 232.
(2) [1892] 1 Ch. 227.
(3) L. R. 1 H. L. Sc. 11.
(4) 49 L. T. 259.
(5) 34 W. R. 561.

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not be released. Here the power is given to the plaintiff as a brother and not to a trustee as such. It is not a power annexed to the office, but is personal to the plaintiff. This power is of the same nature as that in *In re Somes* (1), but the power here is still further away from being a power of the nature of a trust. It is therefore a power which could properly be released.

Guest Mathews (*Gavin Simonds K.C.* with him) for the respondent. If ever there was a case of a power coupled with a duty or trust it is the present case. The testator indicates that he was to restore the family fortunes. The only male member of the family of his own standing was his brother, and the younger generation were unknown to the testator as regards their capacity. It is for this reason that he gives his brother power to select from among his nephews and nieces the person or persons most likely to restore the family fortunes to their proper level. From that point of view the last person to whom the testator could have intended to give his property was his brother, owing to the further death duty that would thus become payable on his brother's death, who was only ten years younger than the testator, who at the date of the will was sixty-six years old. The scheme of the will was that accumulations should continue for twenty-one years, and during that period the younger generation would have an opportunity of showing their capabilities. Is not the fair inference that the testator only intended his brother to take a benefit in the last resort, if no one of the younger generation proved fit to carry on the financial restoration ? Unless therefore the Court is compelled by the law to hold that there could be a valid release of the power, it will not do so. Turning to the construction of clause 19, it is contended that it created a trust or duty in perfectly clear terms. A power coupled with a duty need not be vested in the trustees of the will. A trust or duty can be imposed on any one, and to that extent he is put in the position of a trustee. Thus in *In re Eyre* (2) the power was conferred on two persons by name. They happened

(1) [1896] 1 Ch. 250.

(2) 49 L. T. 259.

to be the trustees, but the power was given to them personally and not annexed to their office. If a power carries with it a trust or duty, it is immaterial whether the donee takes a beneficial interest or not. As regards that power the donee is a trustee. That is the position in the present case, and the power cannot be released: compare *Weller* v. *Ker*. (1) The whole question is whether the testator imposed a trust or confidence on his brother, and clause 19 makes it clear that he did.

H. F. F. Greenland for the defendant trustee.

No reply was called for.

LORD HANWORTH M.R. [after stating the facts:] I need hardly say that I differ with Eve J. on a point of this nature, as indeed on all other matters, with diffidence; but, at the same time, I have come to the conclusion that this appeal ought to be allowed, and that it ought to be determined that the release of the power of appointment is effective. It is important to bear in mind that the power of appointment given to Mr. Egremont John Mills is one over which he has a discretion, and not merely a discretion to appoint, but a discretion not to make any appointment at all if he should come to the conclusion that there was no one of the children or remoter issue of the first Lord Hillingdon who fulfilled the qualifications mentioned in clause 19 of the will. He is under no specific duty to make any appointment at all, and by the very terms of the clause "in default of and until and subject to any such appointment," the trustees are to hold the residue and accumulations "in trust for my said brother absolutely." As stated in the rule set out in Farwell on Powers, 3rd ed., p. 12, "Before the 1st January, 1882" —when the Conveyancing Act came into force—"a power simply collateral could not be extinguished or suspended by any act of the donee, or of any other persons; nor could it be released where it was to be exercised for the benefit of another." The second rule is stated on p. 16: "Before the 1st January, 1882, all powers, other than powers collateral

(1) L. R. 1 H. L. Sc. 11.

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and powers coupled with a trust or duty, might have been, and since the 1st of January, 1882, all powers, other than powers coupled with a trust or duty, may be suspended or destroyed, either wholly or in part by the donees thereof." The power in the present case falls into the third definition which is given by Sir George Jessel in *In re D'Angibau* (1), where he says: "Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant." It is plain from the terms of clause 19 that this power falls into that category, because, if the power is not exercised, then the trust remains in favour of Mr. Egremont John Mills until and in default of his making any appointment, and if and so far as he did make any appointment, then his interest would be undoubtedly affected, and diminished by the exercise of the power.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41) by s. 52 enacts that: "A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power." That section is now reproduced by two sections in the Law of Property Act, 1925—namely, ss. 155 and 160. Although s. 52, and the later sections which replace it, would appear to embrace all powers, it has long been a rule that it is not possible to release a power where it would be a breach of trust to release it or where the trust is coupled with a duty. For my part, I fail to find a distinction between these two expressions, because, as Kay J. said, they are really only two illustrations of the case where the power is in the nature of a trust or is coupled with a trust. What he says in the opening of his judgment in *In re Eyre* (2) is this: "A trustee who has a power which is coupled with a duty is, I conceive, bound so long as he remains trustee to preserve that power and to exercise his discretion, as circumstances arise from time to time, whether the power should be used or not, and he can

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(1) 15 Ch. D. 228, 232.

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no more by his own voluntary act destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him." It would appear therefore that where there is a trust in relation to the power, or the power is embedded in a trust, so that it cannot be released without a breach of trust, then the authority given by s. 52 of the Conveyancing Act, and s. 155 of the Law of Property Act does not avail to enable the donee to do what he cannot properly do under the general law—namely, commit a breach of trust. If there is a fiduciary duty connected with a power, the power, being in the nature of a trust, cannot be released, because a breach of trust must not be committed. In *In re Somes* (1) Chitty J. referred to *In re Eyre* (2) and *Saul* v. *Pattinson* (3) as being "both cases of trustees who had a power coupled with a duty—a fiduciary power in the full sense of the term; and it was held that neither before nor after the Conveyancing Act, 1881, s. 52, were trustees capable of getting rid of or releasing that part of their trust"; and he said about those two cases, as I say about them here, that "they do not apply to the present case." I find it impossible to treat the power in this case as so connected with a duty that it is a power in the nature of a trust, which cannot be released by the donee. There is a gift over to the donee himself, and this takes the case out of the rule in Farwell on Powers, 3rd ed., p. 528: "If there is a power to appoint, among certain objects, but no express gift to those objects, and no gift over in default of appointment, the Court implies a trust for or a gift to those objects equally, if the power be not exercised." Here there is a gift over to the donee in default of appointment and a gift to him until appointment, and, therefore, it is not, to my mind, possible to construe this clause as one in which there is a gift to the possible objects of the power—namely, the children or remoter issue of the first Lord Hillingdon. It follows that it is not a power which is coupled with or embedded in a trust. Eve J. in his judgment said: "It is

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(1) [1896] 1 Ch. 250, 255.
(2) 49 L. T. 259, 260.
(3) 34 W. R. 561.

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impossible to believe that he [the testator] ever intended or contemplated that the plaintiff could at any time after his death by releasing the power or exercising it in his own favour constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation." I find it difficult to follow those words, because, by the very terms of clause 19 of the will, unless and until there is an exercise of the power, the trust is in favour of the brother absolutely.

I will only add a word or two about the cases on which Eve J. relied. *Weller* v. *Ker* (1) was decided in 1866, before the Conveyancing Act was passed, and it was held in that case that the trustees had not in fact given up a power which subsisted until the date fixed for the coming of age of the object of the power, which was when he attained twenty-five years. I cannot myself find any assistance in that case applicable to the present case. Equally, the case that I have already mentioned of *In re Eyre* (2) does not seem to me to have any bearing, having regard to the great difference between the language being construed there and the terms of the clause we have now to construe. *Saul* v. *Pattinson* (3) was distinguished by Chitty J. in his judgment in *In re Somes* (4) to which I have already alluded; and again I cannot see that it is applicable. We have in every case to determine the meaning of the words in the will before us. In the present case the trust is in favour of Mr. Egremont John Mills, in default of and until he makes an appointment, and, having regard to the definite terms of that trust, I cannot see that there is any trust for the benefit of the children or remoter issue of the first Lord Hillingdon or that there is thereby placed upon the donee of the power any fetter to prevent his releasing the power.

For these reasons I have come to the conclusion that we must allow the appeal and answer the question whether the release of June 18, 1929, was effective in the affirmative. The second question, therefore, does not arise.

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(1) L. R. 1 H. L. Sc. 11.
(2) 49 L. T. 259.
(3) 34 W. R. 561.
(4) [1896] 1 Ch. 250.

LAWRENCE L.J. The summons in this action raises two questions, the answers to which depend upon the true meaning and effect of clause 19 of the will of the testator—namely, first, whether the plaintiff can, by deed, release the power thereby conferred upon him; and, secondly, whether the plaintiff can exercise that power in his own favour. By clause 19 the testator directs that, in the events which have happened, the residue of his estate should, subject to the trusts thereinbefore declared, be held "Upon such trusts and for such purposes generally for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of my father who in the opinion of my said brother evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it has been despoiled by death duties and other taxation as my brother the said Egremont John Mills shall by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for my said brother absolutely." In construing this clause, due regard must, of course, be had to the other provisions of the will. In the first place, it is to be noted that, although the plaintiff is one of the two trustees of the will, and although various powers and discretions are conferred in the earlier parts of the will upon the trustees as such, the power conferred by clause 19 is conferred upon the plaintiff by name in his character of brother. It is a power which can only be exercised by the plaintiff personally, and does not devolve upon a future trustee of the will. In the next place, it has to be observed that the primary trust of the residue is in favour of the testator's grandson, Henry Algernon Seymour Mills, who was then an infant, and of any wife whom he might marry and of any issue he might have, subject to an overriding trust for accumulation during a period of twenty-one years in order to replace the amount which would have to be expended on death duties and thus to ensure that his grandson should come into possession of an undiminished estate. It is only owing to the death of the grandson during his infancy unmarried and without issue that clause 19 of the will has come into operation. That clause is introduced by the words "Subject to the trusts and powers hereinbefore contained." Those introductory words, however, do not, in my opinion, operate to postpone either the vesting of the beneficial interest or the right to exercise the power thereby given to the plaintiff. The power came into existence and could properly have been exercised immediately after the death of the testator; it is not a power arising on a future event or upon a contingency. The plaintiff could, on the death of the testator, by an exercise of the power, have conferred on an appointee an absolute interest in the trust fund (subject to any overriding trusts then in operation), which interest, on the death of the grandson unmarried and without issue, would have enabled the appointee to put an end to the trust for accumulation and have entitled him to a transfer of the trust fund. The testator seems to have anticipated such an eventuality, as he has indicated his desire that the appointees should be persons able and willing to replace the amount of the death duties.

I turn now to the question whether the plaintiff can release the power so conferred upon him.

Sect. 155 of the Law of Property Act, 1925, enacts that "A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power"; and s. 160 enacts that this provision applies to "powers created or arising either before or after the commencement of this Act." By a deed dated June 18, 1925, the plaintiff purported to release the power conferred upon him by clause 19 of the will. The effect of that release, if valid, was to extinguish the power and to place the plaintiff in a position to stop the accumulations and to obtain a transfer of the trust fund to himself. It is contended, however, that s. 155 of the Act does not apply to the power conferred on the plaintiff, and that the release of June 18, 1929, is ineffectual and void. This contention is based on the proposition that the power was conferred on the plaintiff as a trustee, coupled with a duty, and that therefore any release of it would be a breach of trust. In my judgment that proposition is unsound. The power is clearly one which falls under the third head in the classification of powers stated by Sir George Jessel M.R. in *In re D'Angibau* (1), i.e., a power appendant or appurtenant. Under the will the trust fund is to be held in default of and until and subject to any appointment in trust for the plaintiff absolutely; it is, therefore, plain that the plaintiff has a beneficial interest in the trust fund, which interest will be affected, diminished or disposed of by an exercise of the power. I know of no case either before or since the Conveyancing Act in which it has been held that a power appendant or appurtenant could not be released, and counsel were unable to refer me to any decision to that effect.

As regards a power in gross it is firmly established that such a power may be released by the donee, even though the release be for his own benefit. See, for instance, *In re Radcliffe* (2), in which case Lindley L.J., speaking of a power in gross, says: "There was a time when it was doubtful whether such a power could be released; but all doubt on that point was removed more than fifty years ago, and no doubt can be thrown or ought to be thrown on the doctrine that was then established, even independently of the 52nd Section of the Conveyancing Act, 1881." As regards powers simply collateral, the matter stands on a different footing. Before s. 52 of the Act of 1881 was enacted such a power could not be released; but since the passing of that Act even a power simply collateral can be released unless it is conferred on trustees coupled with a duty in circumstances which would render a release of it a breach of trust. Eve J. has held that in this case the power conferred on the plaintiff is a power coupled with a duty, and although not a trust, is in the nature of a trust, and, therefore, cannot be released. With the greatest respect for the opinion of the learned judge, I do not agree with this view. The learned judge has based his decision primarily upon an intention to be gathered from the will that the testator did not desire that the power should be released. In his judgment the learned

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(1) 15 Ch. D. 228, 232.

(2) [1892] 1 Ch. 227, 231.

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judge says: "It is impossible to believe that he [the testator] ever intended or contemplated that the plaintiff could at any time after his death by releasing the power or exercising it in his own favour constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation. His intention was that the power should be retained and be exercisable at least down to the expiry of the primary trust for accumulation, he gave the power to the plaintiff for the benefit of those who formed the class from from which he could select those who should become possessed of the fund increased by the accumulations, and I cannot accede to the view that in these circumstances the plaintiff is free to divest himself of the power or to do anything which will preclude him from exercising it hereafter." Although there can be no doubt that an intention, either expressed or implied, that a power should not be released by the donee is relevant in considering whether that power has been conferred upon the donee as a trustee, coupled with a duty, yet if it appears from the will that the power is in fact not so conferred then, in my judgment, it is immaterial whether or not the testator, either expressly or by implication, indicates an intention that the power should not be released. A donor rarely if ever indicates an intention that a power conferred by him should be released. The right of release is either given to the donee by statute or is inherent in the donee, unless the power be conferred upon him as a trustee, coupled with a duty. In the present case it cannot be contended that the power is a power in the nature of a trust, in the sense in which that expression is understood by lawyers. Mr. Fergus Morton has called our attention to chapter 12 of Farwell on Powers, 3rd ed., which deals exhaustively with that class of powers, and has demonstrated, to my satisfaction, that the power in the present case differs essentially from any of those referred to in that chapter. The plaintiff is admittedly not under any duty to exercise the power and there is nobody who could enforce its exercise or complain of a breach of trust if it were not exercised. Moreover there is a gift in default of its exercise to the plaintiff himself, so that no gift can be implied to the persons indicated as possible appointees in the event of the plaintiff making no appointment. All the arguments addressed to us by Mr. Guest Mathews seem to me to apply a fortiori to a power in gross. A power conferred upon a tenant for life to appoint among his own children seems to me to be very much on a par, but not such a strong case as the present. The only difference is that in the case of a tenant for life the donee, by exercising the power, does not diminish or affect his own beneficial interest, whereas in the case of a power appendant or appurtenant, such as we have here, the donee, on an exercise of the power, necessarily diminishes or extinguishes his beneficial interest. Such difference as there is between the two cases therefore is a difference which tells in favour of the present plaintiff's contention.

The three cases to which the learned judge has referred as supporting his view are, in my judgment, distinguishable from the present case. Taking them in order of date there is, first, the case of *Weller* v. *Ker* (1), which was decided in the year 1866, before the Act of 1881. In that case a duty was laid on the trustees to convey the trust estate to the eldest son of the testator for an estate tail on his attaining the age of twenty-five years, subject to a declaration that in case the son should marry, or otherwise conduct himself so as not to merit the approbation of the trustees, the estate to be then conveyed to him should be a life estate only with remainder to his children in fee. It is clear therefore that there was an imperative duty imposed upon the trustees to convey some estate to the son when he attained twenty-five years, and until that event happened it was impossible for the trustees to determine whether the estate which they ought then to convey was an estate in tail or only an estate for life. The power, which was vested in the trustees, was plainly a purely collateral power in the nature of a trust; and in order to perform their duty they were bound to keep the power alive until the son attained the age of twenty-five, as it would obviously have been a breach of trust to have released it before that date.

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(1) L. R. 1 H. L. Sc. 11.

The next case is the one which was chiefly relied upon by the learned judge and by Mr. Guest Mathews before us—namely, *In re Eyre.* (1) In that case again the power in question was a power simply collateral, which is the most common form of power coupled with a duty. The power was given to the two trustees of the will by name, without calling them trustees, but the property the subject-matter of the power was vested in them as trustees, and they had no beneficial interest in it. Kay J. while pointing out that it was a power given to the two donees nominatim, and, therefore, would not pass to any future trustee of the will, held that it was nevertheless a power given to them as trustees, and that it was a power coupled with a duty which prevented its being released without a breach of trust.

The last of the three cases is *Saul* v. *Pattinson* (2) before Pearson J. In that case it is to be observed that the power with which the learned judge had to deal was again a power simply collateral to be exercised by trustees who had no beneficial interest in the property the subject-matter of the power. It was conferred upon the trustees as such, and the learned judge founded himself upon *Weller* v. *Ker* (3), which he considered was on all fours with the case which he had to decide.

It follows, from what I have said, that in my opinion the three cases upon which the learned judge has, to a large extent, based his judgment do not apply to the present case.

It seems to me, as I have said before, that in the present case the testator has given his trust fund, in the events which have happened, to his brother absolutely with a power, appendant or appurtenant, to appoint the fund to some person or persons of the donee's own selection, the class from which the selection might be made being limited to the descendants of the testator's father. There is no obligation on the donee to exercise the power, and unless and until he exercises it he remains the beneficial owner of the trust fund, his absolute interest in which is only to be displaced

(1) 49 L. T. 259.

(2) 34 W. R. 561.

(3) L. R. 1 H. L. Sc. 11.

if and to the extent to which he should choose to exercise the power. In my judgment such a power comes directly within s. 155 of the Act of 1925, and the plaintiff can release it or contract or covenant not to exercise it.

In the result I agree that the proper order to make is to declare that the release of June 18, 1929, is a valid and effectual release of the power of appointment conferred by the testator's will on the plaintiff.

In these circumstances it is unnecessary to decide the second question raised by the summons, and not having heard any argument on that question I prefer not to express any opinion whether the plaintiff is himself one of the objects of the power or not.

ROMER L.J. I have arrived at the same conclusion. Before the Conveyancing Act, 1881, the donee of every power, other than a collateral power, and since the coming into operation of that Act the donee of every power, whether coupled with an interest or not, can release the power. Of course, no donee can exercise that power of release where he would commit a breach of trust by so doing. It has, accordingly, been held in cases, both before and since the passing of that Act, that where trustees have conferred on them, as incident to the execution of their trusts, certain powers, they cannot release those powers during their trust; and that, of course, is really obvious, because a trustee can no more divest himself of such a power than he can divest himself of the property given to him and intended to be held by him for the purpose of carrying into effect the trusts of the particular document.

The question, therefore, that we have to determine in the present case is whether this particular power is conferred upon the plaintiff, the testator's brother, as a trustee. It is not contended by Mr. Guest Mathews, and it could not be contended, that the power is conferred upon him as one of the general trustees of the will. But I agree with Mr. Guest Mathews that this does not conclude the matter, and that the brother may, nevertheless, be a trustee of this particular power. The learned judge arrived at the conclusion that he was a trustee of this power, and did so on the ground that the testator had indicated in his will the intention that the power should be retained and be exercisable at least down to the expiry of the primary trust for accumulation. With all deference to the learned judge, I find myself unable to arrive at the same conclusion. I do not, for myself, see how it would be possible for us to hold that this power, given to the brother, is a power in the nature of a trust or a power coupled with a duty, unless we are prepared to hold that every power of selection given to a beneficiary is a power in the nature of a trust, even where there is a gift over in default of the exercise of the power of selection. It is true that here the brother is given power by the testator to select from amongst the descendants of the testator's father one or more of them to succeed to the residuary trust fund which, pending the exercise of that power, and in default of the exercise of that power, is vested in the brother himself absolutely. In the ordinary case where a trust fund is directed to be held upon trust for a tenant for life, and after his death upon trusts for such of his children as he may select, and in default of his exercising that power, in trust for the children equally, the testator always, in one sense, hopes and intends that the donee of the power will, when the time comes, carefully and wisely select which of the class indicated by the testator should succeed to the capital of the fund. But in such a case as that it has been held over and over again that the power is not a power in the nature of a trust or a power coupled with a duty. The reason for that is stated in Farwell on Powers, 3rd ed., p. 17. The learned author says: "Such powers cannot be called trusts, for the alleged cestuis que trust cannot compel their execution; and as it is at the option of the donee to exercise it or not, any dealing with the estate inconsistent with its exercise must determine the option"; and the learned author referred to *Smith* v. *Death* (1) amongst other authorities for the proposition. The facts of that case are stated as follows: "The plaintiff's title depended upon the will of Edward Wise, who

(1) (1820) 5 Madd. 371.

devised the property in question to Charles Brown for life, with remainder to the use and behoof of such child and children of the body of the said Charles Brown, and him surviving, who should be brought up and educated as a member of the Established Church of England, and should be a constant frequenter or frequenters thereof, in such parts and proportions, etc., as he the said Charles Brown should by deed or will appoint; and in default of such appointment, to the use of the first son of the body of the said Charles Brown, lawfully begotten, who should be brought up and educated as aforesaid, and should be a constant frequenter of the said Church of England, and the heirs of the body of such son, with divers remainders over. The first son of Charles Brown attained his majority in 1817, and soon afterwards joined with his father in suffering a recovery, under which, the plaintiff claimed." The effect of that recovery was to extinguish the power, unless it was a power in the nature of a trust, a power coupled with a duty, and in giving judgment Leach V.-C. said that it made no difference that the power was a particular power in favour of children; that *King* v. *Melling* (1) was a particular power in favour of the wife; that such a power could not be called a trust, for the alleged cestui que trust could not compel the execution of it, and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option. In the present case the plaintiff has been given, as I say, a power of selection; but inasmuch as none of the persons forming the class from which he can select has any power to insist upon the exercise by him of his power of selection and appointment, the power, in my opinion, is not a power coupled with a trust, and could, therefore, be validly released by the plaintiff.

For these reasons, I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors: *Murray, Hutchins & Co.; Bircham & Co.*

H. C. G.

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(1) (1672) 1 Ventr. 225.

MAUGHAM J.

1930

Jan. 22, 23.

FLEXMAN *v.* CORBETT.

[1929. F. 521.]

Vendor and Purchaser—Sale of Leaseholds—"Usual covenants"—Onerous Covenants.

By an agreement, in the form of a letter dated December 12, 1928, and signed by the defendant, the defendant agreed to purchase from the plaintiff for 800*l.* a leasehold house for the residue of the term of 94 years comprised in a lease of 1849. The letter stated that the defendant understood the ground floor and basement to be let to a tenant holding over as a yearly tenant at a rent of 60*l.* a year, payable quarterly, and it fixed March 25, 1929, as the date for completion. The plaintiff signed an acknowledgment agreeing the terms as in the letter. In the lease of 1849 were lessee's covenants to do outside painting, deliver up, repair, insure, produce assignments, not to allow building without consent, and not to carry on offensive trades or do "any . . . . thing which may be to the annoyance, damage, or inconvenience of the occupiers of the neighbouring premises"; and there was a proviso for re-entry on non-performance of any of the covenants. The abstract was sent to the defendant's solicitors on January 15, 1929, the defendant meanwhile, to the plaintiff's knowledge, negotiating for the purchase of the freehold. On March 4 the defendant's solicitors wrote to the plaintiff's solicitors that the defendant would not buy the house unless H. (the tenant), who was in arrear with the rent and was not, as the plaintiff had represented her to be, a desirable tenant, was bought out. They added that there was no binding contract, which they later explained to mean that the lease of 1849 had not been produced to the defendant. The defendant did not complete by the date fixed. In an action by the plaintiff for specific performance:—

Held, (i.) that the question whether covenants in a lease are "usual covenants" is in each case a question of fact for the Court to decide upon the evidence:

(ii.) that a covenant to do nothing to the "inconvenience of occupiers of neighbouring premises" is usual only in leases of properties on large estates, and in a lease of one house is unusual and onerous:

(iii.) that the proviso for re-entry on breach of any of the covenants in the lease must be held on the authorities and on the evidence to be an unusual and onerous provision:

(iv.) that in the circumstances the defendant's right to object to the lease as containing unusual and onerous covenants had not been waived.

Hampshire v. *Wickens* (1878) 7 Ch. D. 555 considered.

Bennett v. *Womack* (1828) 7 B. & C. 627; *Allen* v. *Smith* [1924] 2 Ch. 308; *Brookes* v. *Drysdale* (1877) 3 C. P. D. 52; *In re Anderton and Milner's Contract* (1890) 45 Ch. D. 476; *In re Lander and Bagley's Contract* [1892] 3 Ch. 41; *Hyde* v. *Warden* (1877) 3 Ex. D. 72; and *Reeve* v. *Berridge* (1888) 20 Q. B. D. 523 followed.

ACTION.

By an agreement dated December 12, 1928, and made between Elizabeth Hannah Flexman (hereinafter called "the plaintiff") and Lily Corbett (hereinafter called "the defendant") it was agreed that the plaintiff should sell and the defendant purchase certain property. The agreement was in the form of the following letter from the defendant to the plaintiff: "I agree to purchase at the price of 800*l.* your leasehold house No. 23 Chepstowe Place (which I understand is held together with No. 25 Chepstowe Place under one lease for the residue of a term of 94 years from June 24, 1849, at a yearly ground rent of 18*l.*, but that the rent and covenants have been apportioned by the freeholders, and that the ground rent payable in respect of No. 23 Chepstowe Place is 9*l.* per annum) and subject to the covenants conditions and provisos contained in the lease. I understand that the ground floor and basement is let to a tenant who is holding over as a yearly tenant, and who is paying 60*l.* per annum, the rent payable quarterly, the landlord paying rates and water rate, and that vacant possession of the remainder of the house will be given to me on completion of the purchase. I purchase the property in its present condition of repair, and should any notice or notices to carry out any repairs be served by the ground landlord or any public authority or official, such repairs are to be carried out by me or at my cost. The purchase is to be completed on the 25th day of March next, up to which date you are to receive the rents and pay the outgoings, and from which date the same are to be received and paid by me, the usual apportionment account being taken on completion. If from any cause other than wilful default on your part the purchase shall not be completed on the 25th day of March next, I will pay interest on the balance of the purchase money at the rate of 7 per cent. per annum up to the actual date of completion. Should any objection or requisition as to title or otherwise be made which you shall be unable or on the ground of difficulty delay or expense unwilling to remove or comply with, you are to be at liberty on giving me not less than seven days' notice in writing to annul the sale, in which case, unless the objection or requisition shall have been in the meantime withdrawn, this agreement shall at the expiration of the notice be annulled, in which case I am to be entitled to the return of the deposit, but without interest, costs, or compensation. I have this day paid to your agents, Messrs. Beard & Son, 110 Westbourne Grove, W. 2, as stakeholders, the sum of 80*l.* as a deposit and in part payment of the purchase money, and I agree to complete the purchase in accordance with this agreement.

"Dated this 12th day of December, 1928."

There followed an acknowledgment by the plaintiff, who appended her name to the statement: "I agree the terms of sale and purchase as above set out." Before the date of the agreement the defendant had stated that she wanted the premises for the purpose of carrying on business as a lodging-house keeper, and that the lease itself was of no use to her unless at the same time she was able to acquire the freehold of the same premises, which she thought she could do for a sum of 800*l.* or less, as the lease had only comparatively few years to run. She went over the premises on an occasion early in December, 1928, with a Mr. Cooper, a member of or managing clerk in the firm of Beard & Son, estate agents carrying on business in the district. They went over the premises and were shown over the ground floor and the basement, where the tenant referred to in the agreement, a Mrs. Hoffer, was living with her husband. On that occasion, nothing material was said about Mrs. Hoffer: but on December 11, 1928, the day before the agreement was signed, there was a meeting at the house, the defendant coming with her sister, and the plaintiff being present with her daughter and her daughter's fiancé. The defendant did not at that time go over the house again, but there was considerable discussion on a number of subjects, the meeting lasting about half an hour. The plaintiff told the defendant that the rent paid by Mrs. Hoffer was 60*l.* a year. The defendant then said that that was rather a small rent, to which the plaintiff replied that she agreed that it was, but that it suited her because they (Mr. and Mrs. Hoffer) were quiet people and kept the place in good order. Nothing was said about the rent's being in arrear. In fact, Mrs. Hoffer owed the plaintiff for the last quarter at that date, and had paid neither the Christmas rent nor the rent payable in the following March: and she was still in arrear at the date of this action.

The lease of 1849 contained covenants by the lessee to do outside painting, to deliver up, to keep in repair, to insure, not to allow building without the lessor's consent, not to carry on offensive trades, and to produce assignments: and it contained also a proviso for re-entry upon non-performance of the covenants. The abstract was sent to the defendant's solicitors on January 15. Meantime the defendant, to the plaintiff's knowledge, continued negotiations for buying the freehold, and was arranging with a building society for a mortgage. Having received letters asking them to attend to the matter, the defendant's solicitors acknowledged receipt of the abstract in the following letter dated February 19, 1929: "Referring to your letter to us of the 14th instant and your previous letters, we duly received the abstract of title, and hope to see the deeds in the course of the next ten days. Will you kindly tell us in whose possession the various deeds mentioned in the abstract are." The plaintiff's solicitors immediately answered saying that they had all the abstracted deeds except the probate. On March 4 the defendant's solicitors wrote: "Re 23 Chepstowe Place. Our client called upon us this morning and discussed with us the proposed purchase of the above. Of course your client is admittedly asking an excessive price for a very short lease, but our client would be prepared to pay this price except for the following very important points. It was distinctly represented to her during the negotiations that the tenant holding over"—that is, Mrs. Hoffer—"was a perfectly desirable one. It now appears that three quarters of a year's rent will be due on March 25 instant, and our client declines to be saddled with an unsatisfactory tenant. If the tenant can be previously bought out, which we understand can be done for 100*l*., our client will be pleased to go on with the matter: otherwise she will withdraw from the transaction. There is, as you are aware, no binding contract." The plaintiff's solicitors asked the defendant's solicitors by telephone what the last sentence of that letter meant: and they answered that the lease had not been produced to the defendant, who had had no opportunity of inspecting it. The defendant did not complete on the date fixed for completion, and two days later the plaintiff issued the writ in this action, claiming specific performance of the agreement and damages. The defendant alleged that she was induced to sign the agreement by the plaintiff's stating that Mrs. Hoffer was a satisfactory tenant, and alleged that that statement was a misrepresentation entitling her to rescind. She alleged further that the covenants in the lease of 1849 were of an unusual and onerous nature, and that she was given no opportunity of acquainting herself with them or with the terms of the lease, and had no notice of the covenants before she signed the agreement: and she claimed rescission of the agreement, and repayment of the sum of 80*l*. which she had paid as deposit with interest at the rate of 4 per cent. from December 12, 1928.

Evidence was called on the question of what covenants were usual in leases of residential houses in London, and text-books were referred to.

Cleveland-Stevens and *M. Gravenor Hewins* for the plaintiff. The plaintiff claims specific performance of the agreement of December 12, 1928, and also damages. The only reason why there has not been completion is because the defendant has refused to complete. This is not due to wilful or other default on the part of the plaintiff.

W. G. Hart for the defendant. What are "unusual and onerous" covenants for the purposes of a case such as this has been determined and constitutes a particular category. If the covenants are outside that category, the vendor is under an obligation to make it quite clear what they are:

Reeve v. *Berridge* (1); *Molyneux* v. *Hawtrey* (2); *Melzak* v. *Lilienfeld* (3); *In re Anderton and Milner's Contract* (4); *In re Lander and Bagley's Contract* (5); *De Soyza* v. *De Pless Pol* (6); *In re Haedicke and Lipski's Contract.* (7)

Cleveland-Stevens in reply. The class of "usual covenants" is not fixed. It will vary with the class of property and with the locality: *Hampshire* v. *Wickens* (8); *Bennett* v. *Womack* (9); *Hart* v. *Hart* (10); *Strelley* v. *Pearson* (11); *In re Anderton and Milner's Contract* (4); *Flint* v. *Woodin* (12); *Pegg* v. *Wisden* (13); *Hyde* v. *Warden* (14); Williams on Vendor and Purchaser, 3rd ed., p. 57; and Fry on Specific Performance, 6th ed., para. 672, p. 317.

MAUGHAM J. [having stated the facts and having dealt with the charge of misrepresentation, which he held to be ill-founded:] I now come to consider the wholly different point which arises with regard to the covenants and the proviso for re-entry contained in the lease. This point has long occasioned doubts among judges and lawyers, and it is one which has been the subject of a good deal of consideration in recent times: and I confess that I think that the view which has been expressed in some of the cases with regard to what are usual covenants in leases of houses for residential occupation in London, if not elsewhere, requires reconsideration at the present time in the light of the existing practice. It is suggested on behalf of the defendant that the Court is bound to find that usual covenants in leases at the present time are those, and those only, which are specified in the case of *Hampshire* v. *Wickens.* (8) They, therefore, are only covenants: (1.) to pay rent; (2.) to pay taxes; (3.) to keep and deliver up in repair; (4.) to allow the lessor to enter and view the state of repair,

(1) 20 Q. B. D. 523, 528.
(2) [1903] 2 K. B. 487.
(3) [1926] Ch. 480.
(4) 45 Ch. D. 476.
(5) [1892] 3 Ch. 41.
(6) [1912] A. C. 194.
(7) [1901] 2 Ch. 666.
(8) 7 Ch. D. 555, 561.
(9) 7 B. & C. 627.
(10) (1881) 18 Ch. D. 670, 692, 695.
(11) (1880) 15 Ch. D. 113.
(12) (1852) 9 Hare, 618.
(13) (1852) 16 Beav. 239.
(14) 3 Ex. D. 72, 77, 81.

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and finally, the usual qualified covenant by the lessor for quiet enjoyment. It is true that that case has constantly been cited in text-books and has been referred to from time to time as containing a statement of what are usual covenants in a lease of a house. I think it right to express my opinion, after having heard and considered all the numerous authorities which have been cited to me, that the question whether particular covenants are usual covenants is a question of fact, and that the decision of the Court on that point must depend upon the admissible evidence given before the Court in relation to that question. I think that it is proper to take the evidence of conveyancers and others familiar with the practice in reference to leases and that it is also permissible to examine books of precedents. It is permissible to obtain evidence with regard to the practice in the particular district in which the premises in question are situated. I would add that in my view it is a complete mistake to suppose that the usual covenants in regard to a lease, for instance, of a country house are necessarily usual covenants in regard to the lease of a London residence, and I would add that it seems to me that it may very well be that what is usual in Mayfair or Bayswater is not usual at all in some other part of London such, for instance, as Whitechapel. Further, in my opinion, " usual " in this sense means no more than "occurring in ordinary use," and I think that it is an error to suppose that the Court is entitled to hold that a particular covenant is not usual because it may be established that there are some few cases in which that covenant is not used. If it is established that (to put a strong case) in nine cases out of ten the covenant would be found in a lease of premises of that nature for that purpose and in that district, I think that the Court is bound to hold that the covenant is usual. The Court must bear in mind here the ultimate question which is being decided, which is whether the form of the covenant is such as to constitute a defect in the subject-matter of the contract: and if it were established that the lease is in the form in which it would be anticipated as being in the great majority of cases, having regard to the nature of the property and to the place where it is situated and to the purposes for which the premises are to be used, it does not seem to me reasonable to say that there is a defect in the subject-matter of the contract.

I do not think it necessary to go through and comment upon all the authorities which have been cited to me on this subject, because I have come to the conclusion that the question for me must be, not whether such a covenant as the covenant to insure, which is mentioned as objectionable in this case, justifies the defendant in refusing to complete—a thing which I may say I should be very loth to hold—but whether there are not in the lease covenants which the defendant is entitled to rely upon as being unusual and onerous. The covenant which I propose to consider from that point of view is the one which is shortly described as a covenant in regard to nuisance. It is in these terms: Not to carry on the trade of "soapboiler, tallow melter, tripe dresser or boiler, catgut spinner, hog spinner, boiler of horseflesh, slaughtersman or any other offensive or noisome trade or dealing, or be party to or suffer any act or thing which may be or grow to the annoyance, damage or inconvenience of the occupiers of the neighbouring premises." It is material to bear in mind that it is not established that the premises form part of a building estate in an ordinary sense, or that the premises form part of a property belonging to the original landlord and developed by him; in other words there was nothing to lead the defendant to the conclusion that the property which she was buying was subject to certain covenants for the benefit of adjoining owners and that adjoining owners were in like manner subject to covenants for her benefit. It is quite reasonable, and, I think, to be anticipated, that, where a great landlord like the Duke of Westminster or Lord Portman, owning a large amount of property in London, grants leases to a number of people who would be adjoining tenants, there would be inserted in the leases provisions for the benefit of the property as a whole: and I think that the person taking a residential house on the Portman estate or the

Westminster estate would find difficulty in persuading me that he did not expect to find in the lease a provision that he was not to do anything which might be to the annoyance and damage of the occupiers of adjoining premises. That is a clause which is inserted for the benefit, not of any particular tenant, but of all. In this case, however, the defendant is not to be taken to be in that position at all: and it is conceivable that if she was going to let the premises as lodgings, as she intended to the knowledge of the plaintiff, she might let to people who were going to indulge, for example, in the practice of the piano or some other occupation of that kind which might be to the annoyance, or at any rate to the inconvenience, of the occupiers of the adjoining premises. I cannot find, either on the authorities or by reason of the parol evidence in this case, that I am justified in saying that that particular covenant in the form in which it runs, including, as it does, "inconvenience" as well as "annoyance and damage," is one which is other than an unusual and an onerous covenant. The evidence on this point has, I have no doubt, been given in good faith. It shows that the lease as a whole is not one of an unduly onerous character, but there was no evidence directed to the point which I have mentioned with regard to that particular covenant, and I would add that the books of precedents which have been referred to show, as I think, quite clearly, that the covenant not to commit nuisance, or to do things which may be deemed to be to the inconvenience of occupiers, is a covenant not inserted in a lease granted by an owner of one house to a tenant, though it is inserted by an owner of a number of houses in the same neighbourhood who is desirous of protecting his various tenants from each other for the benefit of his estate as a whole. I do not, therefore, think it necessary to go into and consider all the other covenants to which the arguments have been directed. I will add only that my view that the question is one of fact is supported by the authority of *Bennett* v. *Womack* (1) and *Hampshire* v.

(1) 7 B. & C. 627.

Wickens (1) and by the decision of my brother Eve in *Allen* v. *Smith.* (2) I might also add the case of *Brookes* v. *Drysdale* (3), in which it was held that a condition that assignments or under-leases shall be registered by the lessor's solicitor and the fee paid to him, was not a usual covenant.

So far I have been dealing with the covenants. The defendant was allowed to amend her defence by adding a similar objection with regard to the proviso for re-entry contained in the lease which is in these terms: "Provided always and these presents are upon this express condition that if the said yearly rent hereinbefore reserved or any part thereof shall be in arrear and unpaid by the space of 21 days next after any of the days or times on which the same ought to be paid as aforesaid or if the said G. Treadaway his executors administrators or assigns shall not well and truly perform and keep all and singular the covenants provisoes conditions and agreements hereinbefore contained on his and their part and behalf to be observed performed and kept according to the true intent and meaning of these presents then and in any or either of the said cases it shall be lawful for the said T. W. Budd his heirs or assigns at any time or times thereafter," to re-enter.

With regard to the covenant for re-entry, there is, again, a good deal of authority. A covenant for re-entry in those terms was held by the Court of Appeal to be unusual in the case of *Hodgkinson* v. *Crowe.* (4) James L.J. says: "I not only do not consider it a proper and reasonable thing to introduce, but to my mind it is a most odious stipulation, it is offensive and it is oppressive beyond measure." The clause included re-entry for breach of covenants generally, as well as for non-payment of rent. It may be added that at the date at which the learned Lord Justice made this statement the Court was not in a position to give relief for trifling breaches, or comparatively trifling breaches, of covenants, and the language that he used was, accordingly, language which one can very well understand. The matter was, however, considered by Chitty J. in *In re Anderton and Milner's Contract.* (1) The learned conveyancing counsel there suggested that having regard to the alteration of the law made under the Conveyancing Act, 1881, s. 14, the insertion of the proviso in the form which involved re-entry not only for non-payment of rent but also for the breach of any of the clauses and covenants of the lease was a proper one, but Chitty J. refused to accept that view. He thought that the law still was, or, rather, that it was still true to say, that a covenant in that wide form was not a usual covenant ; and that decision has been followed in other cases, including the case of *In re Lander and Bagley's Contract.* (2) I do not think that the evidence in this case is sufficient to enable me to express the opinion that the proviso for re-entry is in the usual form, although I think that, even with regard to the proviso for re-entry, the matter is one which might usefully and properly be reconsidered in the light of modern evidence at some future time.

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(1) 7 Ch. D. 555, 561.

(2) [1924] 2 Ch. 308.

(3) 3 C. P. D. 52.

(4) (1875) L. R. 10 Ch. 622, 626.

It is well settled that a purchaser of a lease is not to be held to be affected with constructive notice of the covenants contained in the lease merely because the lease is mentioned in the agreement for the purchase : and it is equally well settled that a purchaser of such a lease is not bound to complete the contract if the lease is subject to onerous covenants or to an onerous provision of an unusual character unless, before the agreement was made, he had a fair opportunity of ascertaining for himself the terms of such covenants. The authorities are *Hyde* v. *Warden* (3) and *Reeve* v. *Berridge* (4), a decision of the Court of Appeal which has been constantly followed. Accordingly, unless there was a waiver of this objection, which lay with the defendant, she is entitled to refuse to complete : and the remaining question that I have to determine is whether there was such a waiver. I have to remember with regard to waiver that the question is whether the facts establish an intention by the defendant

(1) 45 Ch. D. 476.
(2) [1892] 3 Ch. 41.
(3) 3 Ex. D. 72.
(4) 20 Q. B. D. 523.

to waive. In Fry on Specific Performance, 6th ed., p. 621, is the following passage: "Leaving the abstract unobjected to for two years, altering the property, letting it, and apologizing for not paying the purchase-money, which was of course only payable if the title was accepted, have been considered strong acts of waiver. And where the purchaser was in possession twenty years, and, after making frivolous objections and refusing any further explanation of them, still continued in possession, the right to investigate title was held to have been waived. The like was held in a case where a purchaser continued twenty-six years in possession after his requisitions of title were sent in, and had paid a considerable part of his purchase-money, and made alterations. In another case, Lord Romilly M.R. expressed an opinion that the purchaser, having retained the abstract for five months and made no objections to the title, but simply got the vendor to verify the abstract with the title-deeds, had thereby waived all objections as to title. And where the purchasers of a leasehold interest, after investigating and accepting the vendor's title, delayed completion on the ground that they had since discovered an ancient lease which they suggested (but did not attempt to prove) would override the vendor's interest, they were held to have lost the right to make any inquiry on the subject." All those are cases—the authorities are cited, of course, in the book—of a much more serious delay than exists in the present case. The contract here was made on December 12, the abstract was sent in on January 15, and presumably was received by the solicitors for the purchaser on January 16. In the meantime, it appears, the defendant was continuing negotiations for the purpose of acquiring the freehold interest, and, I may add, the vendor knew that she intended to acquire it. She was also making arrangements to obtain an advance on a mortgage from a well known building society. Her solicitors, regrettably, I think, did not acknowledge the receipt of the abstract until as late as February 19, 1929, and in the meantime the plaintiff's solicitors had complained and written several letters asking the defendant's solicitors to give attention to the matter. On February 19 the defendant's solicitors wrote as follows: [His Lordship read the letter, and continued:] There is a prompt reply from the plaintiff's solicitors that they have all the abstracted deeds in their possession with the exception of the probate, but I do not think the letter of February 19 can be deemed to be a waiver of a right to object to the form of the lease. On March 4, thirteen days later, the defendant's solicitors write as follows to the plaintiff's solicitors: [His Lordship read the letter, and continued:] Upon the evidence it appears that the plaintiff's solicitors rang up the defendant's solicitors and asked them what they meant by the final sentence: and the reply was that the lease had not been produced to the defendant, nor had she had an opportunity of inspecting it. I think that that is the evidence on that point, and I do not think that it can be said that, by this delay, and by writing this letter on March 4 without taking the point in definite language, which I agree should have been done as a matter of propriety between the vendor and purchaser, the defendant waived the right to object to the terms of the lease. The truth is this: The defendant put herself in the hands of her solicitors. Her solicitors took from the outset the view which they were repeating here on March 4, that the contract was not a binding contract. It follows from that, I think, that it would be wrong to draw the conclusion that they have waived a right to object to the contract if in truth the contract is a binding one; in other words, I do not think that I can draw from the evidence before me the inference that the facts establish an intention on behalf of the purchaser or her solicitors to waive the objection to title. That the question is whether the purchaser intended to waive the particular objection is, I think, to be derived from the nature of an alleged waiver; and I may add that that is stated to be the test in Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 177. It follows that the defendant is entitled to rely on this somewhat technical objection to the performance by her of the contract, and in these circumstances I think that she is entitled to the return of the deposit. She is entitled, therefore, to the costs of the action, except so far as they have been increased by the claim to rescind on the ground of misrepresentation and, I would add, on the ground which has been given up, that the tenant was not a yearly tenant, but what is known as a statutory tenant under the Increase of Rent and Mortgage (Restrictions) Acts. On the counterclaim the defendant is entitled to her costs and will get repayment of the sum of 80*l.* with interest at the rate of 4 per cent. from December 12, 1928.

Solicitors: *W. A. L. Osborn; King & Jenkins.*

K. R. A. H.

END OF VOL. I.

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Walsh v. *Lonsdale* (1882) 21 Ch. D. 9 distinguished.
Wheeldon v. *Burrows* (1879) 12 Ch. D. 31 ; *Brown* v. *Alabaster* (1887) 37 Ch. D. 490 ; and *Nicholls* v. *Nicholls* (1899) 81 L. T. 811 followed.
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In re Robins [1928] Ch. 721 followed.

Dictum in *In re Gray* [1927] 1 Ch. 242 and decision in *In re Whitaker* [1929] 1 Ch. 662 considered.

Doctrine in *In re Hotchkys* (1886) 32 Ch. D. 408 applied. *In re* SMITH. VINCENT *v.* SMITH
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Braythwayte v. *Hitchcock* (1842) 10 M. & W. 494 considered and applied.

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Bernhardt v. *Galsworthy* [1929] 1 Ch. 549 and *In re Flint* [1927] 1 Ch. 570 applied.

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Att.-Gen. v. *Hanwell Urban District Council* [1900] 2 Ch. 377, and *A.-G.* v. *Pontypridd Urban District Council* [1906] 2 Ch. 257 distinguished.

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